TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~431~~ 160

MOSES B. GEORGE, WILLIAM L. GEORGE, JAMES B. GEORGE, AND JOHN E. GEORGE, COPARTNERS AS M. B. GEORGE & BROTHERS, AND J. W. L. SLAVENS, PLAINTIFFS IN ERROR,

vs.

SAMUEL W. TATE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED JUNE 19, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 431.

MOSES B. GEORGE, WILLIAM L. GEORGE, JAMES B. GEORGE, AND JOHN E. GEORGE, COPARTNERS AS M. B. GEORGE & BROTHERS, AND J. W. L. SLAVENS, PLAINTIFFS IN ERROR,

vs.

SAMUEL W. TATE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print.
Amended petition	1	1
Answer to amended petition	11	7
Reply	13	8
Journal entry, order plaintiff leave to amend petition	14	9
Demurrer of Slavens to petition	15	9
Journal entry, order plaintiff leave to amend petition	15	9
Answer of Slavens	16	10
Reply	23	14
Journal entry, jury empanelled	24	14
Journal entry, trial progressing	24	15
Journal entry, verdict for plaintiff	25	15
Journal entry, motion for new trial overruled. Judgment	26	16
Journal entry, bill of exceptions allowed	26	16
Bill of exceptions	27	17
Supersedeas bond	37	23
Certificate	39	23
Writ of error	40	24
Citation	41	24
Assignment of errors	42	25

1 UNITED STATES OF AMERICA,
District of Kansas, ss:

In the circuit court of the United States in and for the district of Kansas.

SAMUEL W. TATE, PLAINTIFF,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE James G. George, and John E. George, copartners as M. B. George & Brothers, and J. W. L. Slavens, defendants. } 1915.

Be it remembered that on this day, to wit, July 16, 1877, the plaintiff, by his attorneys, filed in the clerk's office of said court his amended petition in said entitled action, which said amended petition is in the words and figures following, to wit:

Amended petition.

In the circuit court of the United States for the district & State of Kansas.

SAMUEL W. TATE, PLAINTIFF,
vs.
MOSES. B. GEORGE, WILLIAM L. GEORGE, James B. George, and John E. George, copartners as M. B. George & Brothers, & J. W. L. Slavens, defendants. } Amended petition.

1st. The said above named Samuel W. Tate, plaintiff, complains of the said above named Moses B. George, William L. George, James B. George, and John E. George, copartners as M. B. George and Brothers, & J. W. L. Slavens, defendants, for that from the year 1871 to the year 1875 the said Moses B. George, William L. George, James B. George, and John E. George were copartners doing business in the States of Kansas and Texas under the firm name of M. B. George and Brothers, and during all of said time one John J. Myers and one William Green were copartners in the said States doing business under the firm
2 name of Myers and Green, and that said Myers in the year 1875 departed this life, leaving as the sole survivor of the said copartnership of Myers and Green the said William Green.

That prior to the 19th day of September, 1872, there had been dealings between the two said copartnerships, and that there was before said time due from said M. B. George & Brothers to the said Myers and Green the sum of $8,509\frac{50}{100}$, with accrued interest, and that in the year 1872, and prior to the said 19th day of September, 1872, the said Myers & Green, as such copartners, commenced a civil action in the district court of Ellsworth County, State of Kansas, against the said M. B. George & Brothers, as such copartners aforesaid, to recover from the defendants M. B. George & Brothers the said sum of $8,509\frac{50}{100}$, with its accrued interest aforesaid, and had filed in the said district court the necessary papers and documents to procure the issuance of sundry attachments in said action against the said M. B. George & Brothers and their property, and in pursuance of such action and proceeding caused & obtained

the issuance of certain writs and orders of attachments to issue in said action as against the property of the said M. B. George & Brothers; and thereupon, under & by virtue of such action and proceeding, and said writs of attachments, the proper sheriff of said Ellsworth County, and the proper sheriffs of other counties in the State of Kansas to whom & which said attachments were directed, seized and took as the property of said M. B. George & Brothers, to satisfy the said claim and demand of the said Myers and Green against said M. B. George & Brothers six hundred & seventy-eight head of cattle of the value of $15,000.00, and the said sheriff had & held the said cattle on said writs of attachments on the 19th day of September, 1872, in the State of Kansas, and within the jurisdiction of said district court, and on that day the said M. B. George & Brothers and the said J. W. L. Slavens, defendants, desiring to release the said cattle from the said attachments, and desiring also to secure the payment of the said debt, in case a judgment should
3 be rendered in said action, and the interest & costs then & thereafter accruing, entered into an agreement with the said Myers & Green, by which agreement in writing, then made by said M. B. George and Brothers and the said J. W. L. Slavens, and then delivered by them to the said Myers & Green, they, the said M. B. George & Brothers and the said J. W. L. Slavens, as their surety, acknowledged themselves to be held & firmly bound unto the said John J. Myers and William Green in the sum of $10,000.00, which said written agreement was subject to a condition thereunder written, wherein & whereby it was provided—

"That whereas the said Myers & Green have heretofore commenced and now have pending a civil action in the district court of Ellsworth County, State of Kansas, against said M. B. George and Brothers to recover the sum of $8,509.50, and have also filed their affidavit according to law for a writ or writs of attachment to issue for the property of said M. B. George & Bros.; and whereas writs of attachments have issued and are now in the hands of the sheriffs of those counties, to which said writs of attachment have been directed; and whereas the said M. B. George & Brothers have property within the jurisdiction of the said court, about to be attached under & by virtue of said writs of attachment; and whereas the said Myers and Green have agreed and promised the said M. B. George & Bros. that they, Myers & Green, will recall the said writs of attachment upon their, M. B. George & Bros., executing a bond with approved security to pay the amount of the judgment and costs which may be rendered in the foregoing named action by the said district court, in 60 days from the rendition thereof, then the foregoing bond to be void; otherwise, to be and remain in full force and effect."

A copy of said agreement & bond is hereto attached, marked A, & made a part of this petition.

And said plaintiff avers that the said Myers & Green then & there, on the said 19th day of September, 1872, approved the security to the said writing obligatory, & then received and accepted the same, of and from the said M. B. George & Brothers, and from the said J. W. L.
4 Slavens, & then & there recalled all orders & writs of attachments theretofore issued in said action, and fully released and delivered up to the said M. B. George & Brothers and the said J. W. L. Slavens all of the said cattle, and fully performed all the conditions precedent of the said contract on their part to be performed, and then received the said bond in lieu & stead of the said seizures & the said attachment in said action, & ever since have wholly refrained from issuing further or other attachments in said action, & the said M. B. George & Brothers & the said J. W. L. Slavens then accepted the said cattle & removed

them out of the State of Kansas, & ever since have kept the same out of the State of Kansas.

And the said plaintiff further avers that on the 14th day of May, 1874, the said action so commenced as aforesaid came on for trial in the said district court of Ellsworth County, Kansas, for trial & was then tried, and upon the said trial being had the said district court then rendered a judgment against the said Moses B. George, William L. George, James B. George, and John E. George as copartners as M. B. George and Brothers, and in favor of the said John J. Myers and William Green as copartners as Myers & Green, for the sum of nine thousand seven hundred and fifty-eight ($9,758.00) dollars debt, and ninety (90) dollars as the costs of said action; and on the 20th day of May, 1874, the said plaintiff and the said Myers & Green caused an execution to issue out of said district court on said judgment against the said M. B. George & Brothers, which execution duly came to the hands of the sheriff of said county of Ellsworth, to whom the same was directed, and said execution was for the want of goods and chattels, property and effects, lands and tenements of the said M. B. George & Brothers, and each of them, duly returned within the time required by law to the clerk of said district court and to the said court wholly unsatisfied, and that the said M. B. George & Brothers, & each of them, were then and now wholly insolvent.

5 And the plaintiff further avers that more than sixty (60) days had elapsed before the commencement of this action since the rendition of the said judgment in said court, and that no part of the said judgment has ever been paid or satisfied, but that the same is wholly unpaid & in full force. Wherefore an action hath accrued on the said written agreement, said bond being assigned to plaintiffs as hereinafter set forth.

Second. The said plaintiff, further complaining of the said defendants, saith and avers that from the year 1871 to the year 1875 the said Moses B. George, William L. George, James B. George, and John E. George were copartners doing business in the States of Kansas and Texas under the firm name of M. B. George and Brothers, and during all of said time one John J. Myers and one William Green were copartners in the said States doing business under the firm name of Myers & Green, and that the said Myers in the year 1875 departed this life, leaving as the sole survivor of said copartnership of the said Myers & Green the said William Green, and that prior to the 19th day of September, 1872, there had been dealings between the two said copartnership', and that before said last mentioned time there was due from said M. B. George & Brothers to said Myers and Green the sum of $8,509$\frac{50}{100}$ *dollars*, with accrued interest; and that in the year 1872 and prior to the said 19th day of September, 1872, the said Myers & Green, as such copartners aforesaid, commenced a civil action in the district court of Ellsworth County, State of Kansas, against the said M. B. George and Brothers as copartners aforesaid, to recover from the defendants M. B. George & Brothers the said sum of $8,509.50, with its said interest, and had filed in the said district court all necessary papers & documents to procure the issuance of sundry attachments in said action against the said M. B. George & Brothers & their property, then situate within the

6 jurisdiction of the said district court, and in pursuance of such action & proceeding had caused and procured the issuance of certain writs and orders of attachments to issue out of said court in said action as against the said property of the said M. B. George & Brothers, and the said writs of attachment were then, on the

said 19th day of September, 1872, in the hands of sundry sheriffs in the said county and in the said State of Kansas, to whom the same were directed for the purpose and with directions to levy the same upon, and seize by virtue thereof, a large amount of property, to wit, 678 head of cattle, of the value of $15,000.00; of the goods & chattels of the said M. B. George and Brothers, then within the jurisdiction of the said district court, and the said M. B. George & Brothers and the said J. W. L. Slavens, desiring the recall of said attachments so that said property should in no wise be disturbed by reason of said proceedings, and desiring to secure the payment of any judgment and costs that might be rendered in said action then pending as aforesaid, did, on the said 19th day of September, A. D. 1872, enter into an agreement in writing with the said Myers and Green by the name of John J. Myers and William Green, which they, the said defendants in this action, then delivered to the said Myers and Green, by which agreement they, the defendants herein, the said M. B. George and Brothers as principal, and said J. W. L. Slavens as their surety, acknowledged themselves to be held and firmly bound unto the said John J. Myers and William Green in the sum of ten thousand dollars, which said written agreement and obligation was subject to a condition thereunder written, wherein & whereby it was provided:

"That whereas the said Myers and Green have heretofore commenced and now have pending a civil action in the district court of Ellsworth County, State of Kansas, against said M. B. George and Brothers to recover the sum of $8,509 50, and have also filed their affidavit according to law for a writ or writs of attachment to issue for the property of said M. B. George & Bros.; and whereas writs of attachments
7 have issued and are now in the hands of the sheriffs of those counties, to which said writs of attachment have been directed; and whereas the said M. B. George & Brothers have property within the jurisdiction of the said court, about to be attached under and by virtue of said writs of attachment; and whereas the said Myers and Green have agreed and promised the said M. B. George & Bros. that they, Myers & Green, will recall the said writs of attachment upon their, M. B. George & Bros., executing a bond with approved security to pay the amount of the judgment and costs which may be rendered in the foregoing named action by the said district court, in 60 days from the rendition thereof, then the foregoing bond to be void; otherwise to be and remain in full force and effect."

A copy of said written agreement & bond is hereto attached, marked A, and made a part of this petition.

And the said plaintiff avers that the said Myers and Green on the said 19th day of September, 1872, approved the security to the said writing and bond & then received and accepted the same of and from the said defendants in this action, and then & there recalled all orders and writs of attachments theretofore issued in said action, and then fully released & delivered up to the said defendants herein & therein all of the said property, and then and there fully performed all the conditions precedent on their part of said contract to be performed, and then & there accepted of said defendants the said bond & agreement in lieu & in stead of the said seizures, proposed seizures, said property and said attachments in said action, and ever since have refrained from issuing other or further attachments therein, and the said defendants by reason of such release and recall then took full possession & control of the said property, removed the same out of the jurisdiction of said district court, and have ever since kept the same; and the said plaintiff

avers that on the 14th day of May, 1874, the said action in the said district court came on for trial in the said district court of said Ellsworth County, and was then tried therein, and the said district court
8 then & there in the said action rendered a judgment in favor of the said John J. Myers and William Green, copartners as Myers and Green, against the said Moses B. George, William L. George, James B. George and John E. George, copartners as M. B. George and Brothers, for the sum of nine thousand seven hundred and fifty-eight ($9,758.00) debt, and ninety ($90) dollars as the costs of the said action, and on the 20th day of May, 1874, an execution was duly caused to be issued out of said court on said judgment against said M. B. George & Brothers, directed to the sheriff of said Ellsworth County, and the same duly came to the hands of said sheriff, and the same was, for want of goods and chattels, property and effects, lands and tenements, of the said M. B. George and Brothers, and each of them, duly returned to the clerk of said court and to the said court wholly unsatisfied, and the said M. B. George and Brothers, and each of them, were then and ever since wholly insolvent; and plaintiff further avers that more than sixty (60) days had elapsed before the commencement of this action since the rendition of said judgment by said district court, and that no part of the same has ever been paid or satisfied, and ever since & now is in full force, of all of which the said defendants have had notice, said bond being assigned to these plaintiffs as hereinafter set forth.

Third. The said plaintiff, further complaining of the said defendants, saith and avers that on or about the 19th day of October, 1872, the said Myers and Green were indebted to him in a large amount of money, to wit, more than $12,000.00, then due, and that the said Myers and Green then, in consideration of the said indebtedness, sold, assigned, and transferred to this plaintiff their then claim and demand, then in suit against the said M. B. George & Brothers, mentioned in the foregoing counts of this petition, by a written assignment, duly executed and delivered by said Myers & Green to the said plaintiff; that the said plaintiff is unable to give a copy thereof because, he saith, the same is now mislaid or lost.

9 Fourth. The said plaintiff, further complaining of the said above named defendants, saith and avers that after the rendition of the judgment referred to in the foregoing allegation of this petition in favor of said Myers and Green and against said M. B. George and Brothers, to wit, on the 18th day of May, A. D. 1874, the said Myers & Green duly assigned to the said plaintiff, in writing, the said judgment and the bond and instruments connected therewith, and all their right, title, and interest thereto and therein, for value theretofore paid by said plaintiff to said Myers and Green, and thereby authorized the said plaintiff to collect the said judgment, sue the said bond, and maintain this action; which said assignment was and is in the words and figures following, to wit:

In the district court of Ellsworth County, State of Kansas.

JOHN J. MYERS & WILLIAM GREEN, COPARTNERS as Myers & Green, plaintiffs,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, James B. George, and John E. George, copartners as M. B. George and Brothers, defendants.

1874, MAY 14TH.—Judgment against the said defendants, M. B.

George & Brothers, in favor of said Myers & Green. Debt, $9,758.00; costs. $.

Whereas said Myers and Green, since the commencement of the above suit & before the said judgment, sold their demand against the defendants to Samuel W. Tate for a debt owed by Myers and Green to Tate, and said suit has been carried on in the name of Myers & Green to judgment, and the said judgment and the bonds and instruments connected therewith & taken in said suit by the plaintiffs from the defendants & their sureties belong to said Tate: Therefore we, the said
10 Myers and Green, hereby for value received by us from said Tate, do sell, transfer, set over, and assign to the said Samuel W. Tate the said judgment, and all bonds and instruments taken therein & connected therewith during the progress of said suit, and all our right & title therein and thereto, with full power to the said Tate to collect, sue the same, and to receipt therefor as fully as we or either of us could do.

As witness our hands at Ellsworth, in the State of Kansas, this 18th day of May, A. D. 1874.

(Signed) MYERS & GREEN.

Wherefore and by reason of the premises an action hath accrued to the said plaintiff against the said defendants.

Wherefore the said plaintiff prays a judgment against the said defendants and each of them for the sum of $9,758.00, with interest thereon from May 14th, 1874, at the rate of 7 per cent. per annum; for $90, the costs of said action in said Ellsworth court, and for the cost of this action.

A. H. CASE, J. G. SPIVEY & J. K. CRAVENS,
Att'ys for Plaintiff.

Copy of bond A.

Know all men by these presents that we, M. B. George, William L. George, James B. George, & John E. George, copartners doing business under firm name and style of M. B. George and Brothers, as principal, and J. W. L. Slavens, of Kansas City, Missouri, as surety, are held and firmly bound unto John J. Myers and William Green in the full sum of ten thousand dollars, to the true payment whereof we hereby bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents, signed, sealed, and dated this 19th day of September, A. D. 1872.

The condition of the foregoing bond is this, that whereas the said Myers and Green have heretofore commenced and now have pending a civil action in the district court of Ellsworth County, State of Kansas, against said M. B. George & Brothers to recover the sum of
11 $8,509.50, and have also filed their affidavit according to law for a writ or writs of attachment to issue for the property of said M. B. George & Bros.; and whereas writs of attachment have issued and are now in the hands of the sheriffs of those counties to which said writs of attachment have been directed; and whereas the said M. B. George & Brothers have property within the jurisdiction of the said court, about to be attached under and by virtue of said writs of attachment; and whereas the said Myers and Green have agreed and promised the said M. B. George & Bros. that they, Myers & Green, will recall the said writs of attachment upon their, M. B. George & Bros., executing a bond with approved security to pay the amount of the judgment and costs which may be rendered in the said action against said M. B. George & Bros.:

Now, therefore, if we, the *the* foregoing named bounden parties, shall

well and truly pay to Myers and Green the amount of the judgment & costs which may be rendered in the foregoing named action by the said district court, in 60 days from the rendition thereof, then the foregoing bond to be void; otherwise, to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this the 19th day of September, A. D. 1872.

(Signed) M. B GEORGE & BROS. [SEAL.]
J. W. L. SLAVENS. [SEAL.]

(Endorsed:) No. 1915. Samuel W. Tate vs. M. B. George et al. Amended petition. Filed July 16, 1877. A. S. Thomas, clerk. Case, Spivey & Cravens, att'ys.

And on this day, to wit, Sept. 6, 1877, the defendants by their attorneys filed in the clerk's office of said court their answer to amended petition in said entitled action; which said answer is in the words and figures following, to wit:

Answer to amended petition.

In the circuit court of the United States for the district of Kansas.

SAMUEL W. TATE, PL'FF,
vs.
M. B. GEORGE, WM. L. GEORGE, JAMES B. George, and JOHN E. George, copartners as M. B. George & Brothers, def'ts. } No. 1915.

12 Defendants, for answer to the pl'ff's amended petition, say it is true they in their firm name executed the bond sued on in this action. They aver that said M. B. George, a member of their said firm, signed their said firm name to said bond & delivered the same at Ellsworth, in the State of Kansas, none of the other defendants being present or having any knowledge thereof.

And they say that said M. B. George was induced to sign said firm name to said bond & deliver the same solely by the false & fraudulent representations of Wm. Green, who, with J. J. Myers, copartners as Myers & Green, then had a suit pending in the district court of Ellsworth County, Kan., for $8,589.50 against these defendants, and the false & fraudulent representations of J. G. Spivey, the att'y of said Myers & Green in said suit, which said false & fraudulent representations of said Green & Spivey were as follows, viz, they represented to said M. B. George at the time of the execution of said bond that 678 head of cattle, which def'ts had sold but had not yet delivered to the purchasers, had been seized and attached by virtue of writs of attachment issued in said suit as the property of defendants, & were then held by virtue of such attachments.

Defendants say that said cattle were then a great distance from said Ellsworth & said M. B. George did not know whether they were attached or not, but relied solely on the representations of said Green & Spivey & was thereby induced to execute said bond, & would not executed said bond but for said representations, which he believed to be true.

Defendants deny that they desired to secure said judgment mentioned in pl'ff's amended petition or any judgment or debt due to said Myers & Green, & aver that said bond was not executed for any such purpose or consideration.

Defendants deny that said Myers & Green ever recalled the writs of attachments mentioned in pl'ff's amended petition; they deny that any writ of attachment was ever issued in said suit to the sheriff of Ellsworth County or to the sheriff of said Ellis County, or that any such writ of attachment was in the hands of the sheriff of Ellsworth County
13 or the sheriff of said Ellis County at the time of the execution of said bond.

They deny that said Myers & Green ever released said cattle to def'ts & J. W. L. Slavens from the said alleged writs of attachments or any attachments.

They deny that Myers & Green were indebted to pl'ff in the sum of $12,000 or in any sum on or about the 19th day of Sept., 1872, or at any time.

They deny that Myers & Green, in consideration of any such indebtedness or for any purpose, ever assigned to pl'ff their claim then in suit against said M. B. George & Brothers.

They deny that said Myers & Green ever assigned to said pl'ff the judgment mentioned in said amended petition or the bond herein sued on by plaintiff, or ever authorized to pl'ff to collect said judgment or sue the said bond.

Wherefore def'ts ask judgment.

L. C. SLAVENS & NELSON COBB,
Att'ys for Def'ts.

(Endorsed:) No. 1915. Samuel W. Tate vs. M. B. George et al. Answer to pl'ff's amended petition.

Let this answer be filed.

Filed Sept. 6, 1877.

A. S. THOMAS, *Clerk.*

And on this day, to wit, Sept. 18, 1877, the plaintiff by his attorneys filed in the clerk's office of said court his reply in said entitled action, which said reply is in the words and figures following, to wit:

Reply.

In the circuit court of the United States for the State & district of Kansas.

SAMUEL W. TATE, PLAINTIFF,
vs.
M. B. GEORGE, WILLIAM L. GEORGE, JAMES B. GEORGE, and JOHN E. GEORGE, copartners as M. B. GEORGE & BROTHERS, & J. W. L. SLAVENS, defendants.

14 The said Samuel W. Tate, for reply to the answer of the defendants M. B. George, William L. George, James B. George, and John E. George, copartners as M. B. George & Brothers, filed in this case on the 6th day of September, A. D. 1877, saith that he denies each & every, all and singular, the allegations and averments therein contained, except the following words contained in the first clause of the said answer, to wit: "Defendants for answer to the pl'ff's amended petition say it is true they in their firm name executed the bond sued on in this action," the same being the first three lines of said answer.

Wherefore he asks judgment as in his petition prayed for.

A. H. CASE, J. G. SPIVEY, &
J. K. CRAVENS,
Att'ys for Plaintiff.

(Endorsed:) No. 1915. Samuel W. Tate vs. M. B. George et al. Reply. Filed September 15th, 1877. , clerk. Filed Sept. 18, 1877. A. S. Thomas, clerk. Case, Spivey & Cravens, att'ys.

And on this day, to wit, Monday, October 8, 1877, in the June term, 1877, of said court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Journal entry.

SAMUEL W. TATE, PLAINTIFF,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, James B. George, and John E. George, co-partners as M. B. George & Brothers, & J. W. L. Slavens, defendants. } 1915.

Now comes the plaintiff by A. H. Case, his attorney, and on his motion it is ordered by the court that he be and he is hereby allowed to amend his petition herein by inserting the name J. W. L. Slavens as defendant in the title of the cause, and by inserting his name as defendant in line number seven between the words Brothers and
15 defendants, and that a copy of this order be served on L. C. Slavens, esq., att'y for defendants, and that said defendant J. W. L. Slavens have twenty days after the service of said order to plead herein.

And on this day, to wit, November 15, 1877, the defendant J. W. L. Slavens, by his attorneys, filed in the clerk's office of said court his demurrer in said entitled action, which said demurrer is in the words and figures following, to wit:

Demurrer of J. W. L. Slavens to amended petition.

In the circuit court of the United States for the district of Kansas.

SAMUEL W. TATE, PL'FF,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, James B. George, John E. George, and J. W. L. Slavens, defendants.

The said J. W. L. Slavens, defendant, demurs severally to each and every of the four several counts or statements of causes of action in said amended petition numbered, respectively, first, second, third, and fourth therein, and states for ground of demurrer to each of said counts that it does not state facts sufficient to constitute a good cause of action.

L. C. SLAVENS & NELSON COBB,
Att'ys for said Def't.

(Endorsed:) No. 1915. Sam'l W. Tate vs. M. B. George et al. Demurrer of J. W. L. Slavens to the several counts of amended petition. Filed Nov. 15, 1877. A. S. Thomas, clerk. L. C. Slavens & Nelson Cobb, att'ys for def'ts.

And on this day, to wit, November 30, 1877, in the November term,

1877, of said court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Journal entry.

SAMUEL W. TATE
vs.
16 GEORGE & BROTHERS ET AL. } 1915.

Now comes said plaintiff, by his attorneys, and thereupon on his motion it is ordered that said plaintiff have leave to amend his petition herein by interlineation.

And on this day, to wit, December 1, 1877, the defendant J. W. L. Slavens, by his attorneys, filed in the clerk's office of said court his answer in said entitled action, which said answer is in the words and figures following, to wit:

Answer of J. W. L. Slavens.

SAMUEL W. TATE, PLAINTIFF,
vs.
JOSEPH B. GEORGE, WILLIAM L. GEORGE, James B. George, John B. George, and J. W. L. Slavens, defendants.

The said J. W. L. Slavens, defendant, for his separate answer to the petition of the plaintiffs herein—

1st. Admits the copartnership of the said Moses B. George, William L. George, James B. George, and John E. George as stated in the petition of the plaintiff herein, and also the copartnership of the said John J. Myers and William Green as therein stated; and also admits that he executed the bond a copy of which is appended to the plaintiff's petition, and denies each and every other allegation of the plaintiff's petition.

2. And for a further answer to the plaintiff's petition this defendant says that at the time of the execution of the bond upon which this action is brought, and immediately previous thereto, the said Myers & Green and their agents, to procure said bond, represented and stated to this defendant that the cattle mentioned in the petition had been levied upon and were held by the sheriff under and by authority of the writs of attachment mentioned in the petition, whereas in truth no such levy had been made and said cattle were not in the custody of any
17 officer, as said Myers & Green and their said agent well knew. That said false representations and statements were made with the purpose to induce and did induce this defendant to sign said bond.

3d. And for a further answer herein by way of set-off said defendant says that on the 28th day of July, 1871, he, this defendant, and James C. Ferguson, Edward B. Howard, Nathan M. Neela, and John H. Manser were partners in business at Kansas City, Mo., under the name and style of Ferguson, Slavens & Co., and this defendant held and still holds a one-third interest in said copartnership, and John Myers and William Green, the obligees in said bond, were partners under the name of Myers & Green, and by their contract in writing, a copy of which is herewith filed, agreed to have packed on commissions by said Ferguson, Slavens & Co. one thousand head of fat steers and five hundred

cows, all to be in prime condition for packing purposes, the steers to weigh not less than one thousand pounds average, and the cows to weigh at least seven hundred & fifty pounds average, to be weighed on delivery at Kansas City, Mo., to be delivered to the said Ferguson, Slavens & Co., at their packing-house, any time between the 15th day of October, 1871, and the 15th day of November, 1871. And said contract also provided that said Myers & Green should also have packed by said Ferguson, Slavens & Co. all other cattle of the quality above mentioned that they might have in certain herds in Kansas therein mentioned; it being therein declared their intention to have so packed all they had that would fill the requirements above named.

Said cattle were to be packed by said Ferguson, Slavens & Co. in good workmanlike manner, and a sale of the proceeds thereof was to be made by them, for all which said Myers & Green were to pay them as follows:

For killing said cattle, one dollar per head; for rendering the tallow, one dollar per 100 lbs.; for cutting and packing, one dollar
18 per barrel; and for cutting and packing per tierce, $1.50 per tierce; for salting and brining, 50 cents per barrel and 75 cents per tierce; for sugar curing hams & tongues, $1.00 per 100 lbs.; for coopering, $2.00 per barrel and $3.00 per tierce; and for iron hoops for tierces, if required, 35 cents per tierce extra; and 2½ per cent. commission all advances and sales of the products of said cattle by them so packed and sold.

And by said contract said Myers & Green agreed to pay said Ferguson, Slavens & Co., as interest on all money by them advanced on said cattle to said Myers & Green, and on all freights which they should pay on the shipping of said cattle to them for packing, and on all money due said Ferguson, Slavens & Co. for the packing of said cattle, the current rate of bank discount in the city of Kansas, Mo., at the time, which rate this defendant avers has always been 12 per cent. per annum, and that said Ferguson, Slavens & Co. were to have a lien on said cattle for said advances.

That by said contract said Myers & Green agreed so to furnish to said Ferguson, Slavens & Co., for packing, on commission, all the cattle owned by them, in addition to the number above specified, of the qualities and kinds hereinbefore described, which they had in the Dollarhide, Henderson, and Lyons herds, situate in Ellsworth County, Kansas, and said Ferguson, Slavens & Co. were to advance to said Myers & Green on said cattle $15,000 at the date thereof. A copy of said contract is hereto attached.

That said contract was executed in the State of Kansas, and in pursuance thereof said Ferguson, Slavens & Co., on the 1st day of August, 1871, paid and advanced to said Myers and Green on said cattle so to be delivered the sum of $15,000.00.

And that afterwards, on the 13th day of November, 1871, pursuant to said contract, said Myers & Green shipped by railroad from said
19 Ellsworth to said Ferguson, Slavens & Co., at Kansas City, Mo., 1,222 head of steers and 407 cows, to be packed under said contract, and pursuant to said contract said Ferguson, Slavens & Co., on November 15th, 1871, paid freight on said cattle so shipped, which amounted to $3,480.00.

This defendant further says that said Ferguson, Slavens & Co. packed said cattle for said Myers & Green pursuant to said contract in a good workmanlike manner, and that their rates and charges for packing said cattle at the prices named in the contract amounted to $12,926.41, and

that their commissions on sales & advances under said contract amounted to $841.58.

That said Ferguson, Slavens & Co. sold all the products of *of* said cattle by them so packed for the best prices then practicable, and collected the proceeds, and realized all from said proceeds that the utmost care and diligence would enable them to do, but realized only $15,000.00 therefrom.

That the regular rates of bank discount at the city of Kansas, Mo., since the date of said contract has always been not less than twelve per cent. per annum.

That at the commencement of this action there was due from the said Myers & Green on account of the said advances, packing charges, freights paid, and commissions on sales, and all other services provided for in said contract, and for the current rate of bank discount and dues provided for in said contract, after allowing the credit for the amount so received by said Ferguson, Slavens & Co. from sales of the proceeds of said cattle as aforesaid, the sum of $22,500.00.

And this defendant further avers that on or about the 4th day of August, 1871, the said Ferguson, Slavens & Co. advanced to said Green, individually, the further sum of $3,000.00, and afterwards, on or about the 4th day of August, 1871, pursuant to an agreement between
20 the said Green and said Myers & Green with said Ferguson, Slavens & Co., the charge for said advance to said Green was transferred to the account between said Ferguson, Slavens & Co. and said Myers & Green, and the amount credited by said Ferguson, Slavens & Co. to said Green, the said Myers & Green then agreeing *then agreeing* to pay the same in consideration of the release then made by Ferguson, Slavens & Co. of said Green from his individual indebtedness for said advance, and said sum has drawn interest at the rate of 12 per cent. per annum from the time of said advance (the rate of aforesaid bank discount).

And this defendant further says that said Myers & Green, in the year 1871, became, and ever since have been, and now are, totally insolvent.

That at the time of the execution of the bond mentioned in the petition said Ferguson, Slavens & Co. had purchased of said M. B. George & Brothers the cattle therein mentioned, and had made large advances to said M. B. George & Brothers on said cattle, and were ready and desirous to receive and pack said cattle immediately, and this defendant in the interest of his said firm, & for the purpose of having said cattle shipped and delivered to said firm at Kansas City, Mo., signed said bond; the said M. B. George & Brothers then being & still being insolvent.

And that afterwards, & after the rendition of the judgment in the district court of Ellsworth County, mentioned in the plaintiff's amended petition herein, to wit, about the last of July, 1874, and before he, this defendant, had any notice whatever of the alleged assignment, or any assignment of said judgment or said bond by said Myers & Green to the plaintiff herein, the said Ferguson, Slavens & Co., by their agreement in writing, for a valuable consideration, assigned & transferred to this defendant all their right, claim, and demand against said Myers & Green which had accrued to them under said contract, and all
21 their claim & demand against said Myers & Green on account of the aforesaid advance of $3,000.00 by them to said Green, & the agreement of said Myers & Green to assume & pay the same, and said claims & demands this defendant now owns, & has owned ever since said assignment; and the amount so transferred to him has been draw-

ing interest at the rate of 12 per cent. per annum ever since said assignment, & there is now due thereon to this defendant $26,000.00, which he is entitled to set off in this action.

And the de'ft avers that the said written assignment from said Ferguson, Slavens & Co. is lost, and that he cannot therefor' attach a copy of it hereto.

And the defendant prays this court to set off so much of his demand as may be necessary to extinguish any demand that the plaintiff may show himself entitled to in this action, and to render judgment against the plaintiff for costs.

L. C. SLAVENS AND NELSON COBB,
Attorneys for said Defendant.

Copy of contract.

This agreement, made and entered into this 28th day of July, A. D. 1871, by and between J. J. Myers, of Caldwell County, Texas, and Wm. Green, of Hays County, Texas, parties of the first part, and Ferguson, Slavens & Co., packers and general commis. merchants of Kansas City, Mo., parties of the second part, witnesseth:

That the said Myers & Green, jointly owning and holding in herd near Ellsworth, Kansas, sundry lots of cattle, among others, twelve hundred head of beef cattle and seven hundred head or more of cows, and being partners and doing business under the name of Myers & Green, have agreed and in consideration of the premises hereinafter recited hereby contract to pack on commission with the said Ferguson, Slavens & Co. one thousand head of fat cattle, all steers, and five hundred head of cows, all to be in prime condition for packing purposes, and to
22 weigh, the steers not less than one thousand pounds average and the cows at least seven hundred and fifty pounds average, to be weighed on delivery at Kansas City, Mo. The steers to be made up of all there may be that fill the requirements of this contract as to size and condition in the following herds now owned by the party of the first part, in herd near Ellsworth, Kansas, viz, the Dollarhide, Henderson, and Lyons herds, and the cows to be the best there are in the Butler, John Green, Linscomb, or other herds owned by the party of the first part in Kansas, it being the intent of this contract that all of the beaves in the herds named suitable for packing shall go in on this contract, and that the money to be advanced as hereinafter provided shall be a lien upon the herds named; but it is expressly agreed by the parties of the first part that in case there are not enough in the herds named of either steers or cows of the quality required to make up the number contracted, they shall be held under this contract to take from their other herds or purchase, or procure by exchange or otherwise, and deliver enough to make up the full number of the contract of prime packing steers and cows.

The party of the first part agrees to deliver all the cattle contracted to the said Ferguson, Slavens & Co. at their packing house in Kansas City, Mo., at any time between the 15th of October next and the middle of November following, upon notice from the said Ferguson, Slavens & Co. to ship the same. The party of the second part, in consideration of the premises above recited, agrees upon the sealing and delivering of these presents to advance the sum of twelve dollars per head on all the steers to be delivered as per contract, and six (6) dollars per head on the cows, amounting in all to fifteen thousand dollars; and upon receipt of said cattle as per contract at Kansas City, Mo., to advance the freight

bills on the same, and are to receive on all advances and dues the current rate of bank discounts at Kansas City for the time.

23 The party of the second part are to pack said cattle in a good workmanlike manner at the following rates and charges, and make sale of the products, rendering prompt returns on the same, viz., killing, per head, one dollar ($1.00); rendering tallow, per hundred pounds, one dollar ($1.00); cutting and packing, per barrel, one dollar ($1.00); cutting and packing, per tierce, one dollar and fifty cents ($1.50); salting and brining, per barrel, fifty cents (50 cts.); salting and brining, per tierce, seventy-five cents (75 cts.); sugar curing hams and tongues, per one hundred pounds, ($1.00) one dollar; cooperage, barrell, two dollars ($2.00); per tierce, three dollars ($3.00); iron hoop when required for tierces thirty-five cents (35 cts.) extra; on all sales and advances, 2½ %.

J. J. MYERS.
WM. GREEN.

(Endorsed:) No. 1915. Samuel W. Tate vs. George & Bros. Answer of Slavens. Filed Dec. 1, 1877. A. S. Thomas, clerk.

And on this day, to wit, Dec. 1, 1877, the plaintiff, by his attorney, filed in the clerk's office of said court his reply to the answer of J. W. L. Slavens in said entitled action, which said reply is in the words and figures following, to wit:

Reply to answer of J. W. L. Slavens.

SAMUEL W. TATE, PL'F,
vs.
M. B. GEORGE & BROTHERS ET AL., DEFENDants.

In circuit court of the United States for the district of Kansas.

The said plaintiff, Samuel W. Tate, for reply to the answer of the said defendant J. W. L. Slavens, saith that he denies each & every, all & singular, the allegations & averments therein contained.

A. H. CASE,
Att'y for Plaintiff.

(Endorsed:) No. 1915. Tate vs. George Bros. et al. Reply. Filed Dec. 12, 1877. A. S. Thomas, clerk. Filed Dec. 1, 1877. A. S. Thomas, clerk. Case, att'y.

24 And on this day, to wit, December 12, 1877, in the November term, 1877, of said court, in the record of the proceedings thereof in said entitled action is the following entry, to wit:

Journal entry.

SAMUEL W. TATE, PLAINTIFF,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, James B. George, and John E. George, copartners as M. B. George and Brothers, and J. W. L. Slavens, defendants. } 19

Now comes the plaintiff herein by A. H. Case, J. G. Spivey, and J.

K. Cravens, his attorneys, and also come the defendants by L. C. Slavens and Nelson Cobb, their attorneys, and to try the issues joined come a jury, to wit, Herman Brandt, Thomas Newton, Henry Booth, Henry L. Whitaker, J. C. Hebberd, A. M. Ruley, John Nesbit, A. P. Riddle, Samuel Keiser, W. T. Bruer, J. A. Pike, and W. D. Disbrow, twelve good and lawful men of the body of the district of Kansas, who being duly empanelled and sworn to well and truly try the issues joined and matters submitted to them in this action, and a true verdict give according to the law and evidence; and thereupon the trial is proceeded with, and not being concluded at the time of adjournment, the jurors are admonished by the court as to their duties herein, and the further hearing postponed until to-morrow.

And on this day, to wit, December 13, 1877, in the November term, 1877, of said court, in the record of the proceedings thereof in said entitled action is the following entry, to wit:

Journal entry.

SAMUEL W. TATE, PLAINTIFF,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, James B. George, and John E. George, 1915.
25 copartners as M. B. George and Brothers, & J. W. L. Slavens, defendants.

Now come the parties herein, same as on yesterday, and the jurors empanelled herein being called, and all being present, the trial of this cause is proceeded with, and the same not being concluded at the hour of adjournment the jurors are admonished by the court as to their duties herein, and the further hearing postponed until to-morrow.

And on this day, to wit, December 14, 1877, in the November term, 1877, of said court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Journal entry.

SAMUEL W. TATE, PLAINTIFF,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, James B. George, and John E. George, co- 1915.
partners as M. B. George and Brothers, and J. W. L. Slavens, defendants.

Now come the parties herein, same as on yesterday, and the jurors empanelled herein being called, and all being present, the trial of this cause is proceeded with, and the jury having heard the evidence, arguments of counsel, and instructions of the court, retire under the charge of a sworn bailiff for deliberation, and afterward the jury come into court under the charge of their sworn bailiff and render their verdict herein in the words and figures following, to wit:

In the circuit court of the United States for the district of Kansas.

SAMUEL W. TATE
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, James B. George, and John E. George, copartners as M. B. George & Brothers, and J. W. L. Slavens. } No. 1915.

We, the jury in the above entitled action, find for plaintiff and fix his damages at twelve thousand two hundred and three dollars and thirty-one cents ($12,203.31).

J. A. PIKE,
Foreman.

And thereupon said defendants give notice of a motion for a new trial.

26 And on this day, to wit, Dec. 18, 1877, in the November term, 1877, of said court, in the record of the proceedings thereof in said entitled action is the following entry, to wit:

Journal entry.

SAMUEL W. TATE, PLAINTIFF,
vs.
MOSES B. GEORGB, WILLIAM L. GEORGE, James B. George, and John E. George, copartners as M. B. George & Brothers, and J. W. L. Slavens, defendants. } 1915.

Now comes the plaintiff herein by A. H. Case, J. G. Spivey, and J. K. Cravens, his attorneys, and the defendants by L. C. Slavens and Nelson Cobb, their attorneys, and the defendants' motion for a new trial of this action came on to be heard, and was argued by counsel, on consideration whereof it is ordered by the court that said motion for a new trial be and the same is hereby overruled, to which ruling and decision of the court said defendants except.

It is therefore now by the court here considered, ordered, and adjudged that said plaintiff herein, Samuel W. Tate, have and recover of and from said defendants herein, Moses B. George, William L. George, James B. George, and John E. George, copartners as M. B. George & Brothers, and J. W. L. Slavens, the sum of twelve thousand two hundred and three dollars and thirty-one cents, and also his costs in this action expended, and that execution issue therefor.

And on this day, to wit, Saturday, January 5, 1878, in the November term, 1877, of said court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Journal entry.

SAMUEL W. TATE, PLAINTIFF,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE,
27 James B. George, and John E. George, copartners as M. B. George & Brothers, and J. W. L. Slavens, defendants. } 1915.

And now came said defendants, and presented thei certain bill of ex-

ceptions taken on the trial of this action; and the same is allowed and signed, and ordered to be placed on file with the pleadings, and made a part of the record in this case.

And on this day, to wit, January 5, 1878, the defendants by their attorneys filed in the clerk's office of said court their bill of exceptions in said entitled action, which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States for the district of Kansas.

SAMUEL W. TATE, PL'FF,
vs.
M. B. GEORGE, WILLIAM L. GEORGE, JAMES B. George, John E. George, and J. W. L. Slavens, def'ts.

Be it remembered that on the 12th day of December, 1877, the above entitled cause coming on for trial in said court, the following proceedings were had, to wit:

The plaintiff read in evidence the judgment rendered in the district court of Ellsworth County, Kansas, on the 14th day of May, 1874, in favor of Myers & Green, and against M. B. George & Brothers, for the sum of nine thousand seven hundred and fifty-eight dollars ($9,758.00), and ninety dollars ($90.00) costs of said suit, which said judgment is set forth & referred to in the plaintiff's petition herein. And plaintiff also introduced evidence whereby he proved that no part of said judgment had ever been paid.

And the plaintiff then offered in evidence the assignment in writing dated November 1st, 1872, which is in words and figures as fol-
28 lows, to wit:

MYERS & GREEN
vs.
M. B. GEORGE & BROS.

I, Wm. Green, in consideration of $8,509.00 (eight thousand five hundred and nine dollars), to me paid by Samuel W. Tate, of Llano County, Texas, do hereby assign to the said S. W. Tate the within written instrument, and all my interest in the covenants and agreements therein contained. That I hereby assign, turn over, and convey to and for the benefit of S. W. Tate, of the county of Llano, State of Texas, all my right and interest in a certain suit now pending in the district court of Ellsworth County, Kansas, wherein I, William Green, and J. J. Myers are plaintiffs, and M. B. George & Bros. are defendants.

And I constitute the said S. W. Tate my attorney irrevocable, with full power at his own charge in my name to take all legal measures which may be necessary or proper for the recovery or enjoyment of the assigned premises, with power of substitution.

Witness my hand and seal this 1st day of November, A. D. 1872.

MYERS & GREEN,
By WM. GREEN.

Executed in the presence of—
G. A. MILLS.

STATE OF KANSAS,
County of Ellsworth:

Personally appeared before me, James Miller, a notary of public in and for the county of Ellsworth, William Green, and G. A. Mills as attest, and declared the signature to the above and foregoing to be of his free will and accord.

JAMES MILLER,
Notary Public.

And the defendants' counsel at the time objected to the introduction of said written assignment in evidence, for the reason that it was irrelelevant and only purported to assign and transfer to the plaintiff Tate the interest of William Green in the claim therein mentioned
29 against said M. B. George & Bros., whose interest therein, if assignable, could not be ascertained until after an accounting between him and J. J. Myers, his partner, and the settlement of their partnership business, which has not been show'.

But the court overruled said objections and admitted said assignment to be read in evidence, to which ruling of the court, in permitting said assignment to be so read in evidence, the defendants' counsel then and there excepted. And there was no other written instrument, written within, endorsed upon, or attach' to said assignment in writing above set forth.

The plaintiff then read in evidence the written assignment from Myers & Green to plaintiff, dated May 18th, 1874, which is in words & figures as follows, to wit:

JOHN J. MYERS AND WILLIAM GREEN, co-partners as Myers & Green, plaintiffs,
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, James B. George, and John E. George, co-partners as M. B. George & Brothers, defendants.

1874, MAY 14TH.—Judgment against the said defendants, M. B. George & Brothers, in favor of said Myers & Green. Debt, $9,758.00; costs, $.

Whereas said Myers & Green since the commencement of the above suit and before the said judgment, sold their demand against the defendants to Samuel W. Tate for a debt owed by Myers & Green to Tate, and said suit has been carried on in the name of Myers & Green to judgment, and the said judgment and the bonds and instruments connected therewith and taken in said suit by the plaintiffs from the defendants and their sureties belong to said Tate: Therefore we, the said Myers & Green, hereby, for value received by us from said Tate, do sell, transfer, set over, and assign to the said Samuel W. Tate the said judgment and all bonds & instruments taken therein and connected therewith
30 during the progress of said suit, and all our right and title therein and thereto, with full power to said Tate to collect, sue the same, and to receipt therefor as fully as we or either of us could do. As witness our hands at Ellsworth, in the State of Kansas, this 18th day of May, A. D. 1874.

MYERS & GREEN

And the plaintiff then introduced C. C. SPRIGG as a witness for plaintiff, who testified as follows:

I was present at the trial of Myers & Green vs. M. B. George & Brothers, at Ellsworth, in May, 1874. I did not then know this defendant Slavens. I saw L. C. Slavens as attorney in the case. I think I saw J. W. L. Slavens; I think that is Slavens. I saw M. B. George. They were present at the trial. William Green testified as a witness. Can't repeat his words. He stated that he was not then the owner of the claim. That he had transferred or assigned it to Tate. He said Myers & Green had no interest. He called him Captain or Col. Tate. I know Samuel W. Tate; I suppose he is the man Green referred to.

P. T. PENDLETON testified as follows:

Was in Ellsworth in May, 1874. Knew Myers & Green, M. B. George & W. L. George. Did not know J. W. L. Slavens. Saw him at May term of court at Ellsworth. He was present at the trial of the case of Myers & Green against M. B. George & Brothers. Green was a witness in that suit. He was asked who owned the claim, and he stated that it had been transferred to Col. Tate and that Myers & Green had no interest in it.

EVANDER LIGHT testified as follows:

I was present at the trial of Myers & Green against M. B. George & Brothers, at Ellsworth, in May, 1874, and heard the statements of William Green on the witness stand. He said that he had assigned his interest in the claim vs. George & Brothers to Col. Tate.

ELNER A. GREEN testified as follows:

I was present at the trial just referred to by Evander Light in
31 his testimony. I heard part of Green's testimony. I heard him say the claim did not belong to him, that it belonged to Col. Tate. Don't know the gentlemen who were present. George was present.

A. H. CASE testified as follows:

I was attorney for plaintiffs in the suit of Myers & Green vs. M. B. George & Brothers, which was tried in the district court of Ellsworth County, Kansas, in May, 1874. Wm. Green testified at that trial that Myers & Green had no interest in the claim then in suit, but had assigned the same to Samuel W. Tate, & at that time J. W. L. Slavens, defendant, was present in court when Green so testified.

SAMUEL W. TATE testified as follows:

Immediately after I got the assignment of November 1st, 1872, read in evidence, I went to Kansas City with Green. We met Major George at the packing house of Ferguson, Slavens & Co. and conversed with Major George; Slavens, or a man whom they said was Slavens, was near by. George said to hold on; he wanted to talk to Slavens, and then would meet me at national bank next day. I told George I had the assignment. Slavens undoubtedly knew it, for he and George walked off together and Green and I went off together. I went to the bank next day, but George did not come. He made a second appointment, and broke it. He then said they would pay when forced to. That was a few days after the assignment of November 1st, 1872. I never said

anything to Slavens about it. I saw Slavens afterwards in Ellsworth, but said nothing to him. I do not know that I ever spoke to defendant Slavens in my life. I was once introduced to him or his brother at Ellsworth, but I do not know which. I consulted with said M. B. George before I purchased the claim of Myers & Green against M. B. George & Brothers, and he told me to buy it; that it was all right & would be paid.

(And the defendants' counsel objected to the introduction of the testimony of each of said witnesses at the time that the testimony
32 of each was respectively offered, because the same was irrelevant. But the court overruled each of said objections and admitted the testimony, to which ruling the counsel for the defendants then and there excepted.)

The defendant SLAVENS, introduced as a witness for defendants, testified:

That he never heard of nor had any notice of any assignment of the said claim of Myers & Green against M. B. George & Brothers, or of the bond herein sued on, or of the judgment given in evidence to the plaintiff Tate, until after the commencement of this suit, and that he was present at Ellsworth court & heard the testimony of Green in the trial referred to by the aforesaid witnesses.

The foregoing is all the evidence given on the trial of this cause tending to prove notice to Slavens, before the commencement of this action, of the assignment dated November 1st, 1872, heretofore set forth. And no other evidence was given at said trial tending to show notice to said Slavens before the commencement of this action *to said Slavens before the commencement of this action* of the assignment dated May 18th, 1874, or tending to show information or knowledge on his part before the commencement of this action, or at all calculated to put him on inquiry as to the existence of such assignment.

Evidence was also given on the trial of this action tending to show that Myers and Green were equal partners in business at the time the assignment of November 1st, 1872, was made, and at the time the said assignment of May 18th, 1874, was made; but there was no other evidence given tending to show what the interest of either of said partners was in their said claim against said M. B. George & Brothers at the time of either of the assignments to Tate hereinbefore set forth.

No other evidence was given on the trial that M. B. George &
33 Brothers, or either of said firm, ever consented that Myers & Green, or either of them, might assign to Samuel W. Tate, this plaintiff, any portion of said claim of Myers & Green against said M. B. George and Brothers less than the entire amount thereof.

Evidence was also given on the trial of this cause that on and prior to May 18th, 1874, said Myers & Green were indebted to Ferguson, Slavens & Co. in a sum greater than the amount of said judgment of Myers & Green against M. B. George & Brothers, dated May 14th, 1874, for $9,758.00 and ninety dollars costs, given in evidence on the trial of this cause; and that said indebtedness was due and unpaid; and that on the last of July, 1874, said firm of Ferguson, Slavens & Co. for a valuable consideration assigned and transferred their said claim and demand, which was still unpaid, against said Myers & Green to J. W. L. Slavens, a defendant in this action.

SAMUEL W. TATE:

Left my home, in Llano County, Texas, about 15th or 16th Oct., 1872;

went to Austin; there saw J. J. Myers, of the firm of Myers & Green. They owed me $11,000, which I wanted to collect. Myers said they were hard up, but that they had a claim against George & Brothers then in suit in Kansas. He said to me, "Go up and see Billy Green and he will let you have the claim against George & Bros." I came on to Ellsworth and there I saw Green and told him what Myers had said to me. Green got Mr. Wills to write the assignment dated Nov. 1st, 1872, and it was delivered to me that day at Ellsworth by Mr. Green. It was then agreed by Mr. Green that the judgment should be assigned to me as soon as rendered. I took the assignment home with me, and afterwards saw Myers in Llano County, Texas. I showed Myers the assignment made by Green; he read it, and said it was all right. I then gave up to Myers the notes of Myers & Green, to the amount of the claim against George & Bros., $. Myers said the bond
34 secured the claim, and that I would be sure of my money. Myers died in spring of 1875. The firm of Myers & Green was insolvent.

The plaintiff also gave in evidence a writ of attachment (dated in September, 1872) issued in the attachment suit mentioned in the bond herein sued on, on which writ the sheriff of Ellis County, Kansas, to whom it was issued on the 19th day of September, 1872, returned that he had by virtue thereof on the 17th day of September, 1872, attached 675 head of cattle in said county, said to be the cattle of M. B. George & Brothers, and that he had on the 19th day of September, A. D. 1872, released said cattle & returned said writ on the order of the plaintiffs, Myers & Green, in the said action in Ellsworth County, State of Kansas.

The defendants, on the trial of this cause, offered to prove that they were induced to execute the bond sued on by the representations of said Myers & Green and their agents and attorneys, made to defendants at the time of the execution of said bond; that the cattle of said M. B. George & Brothers had been attached, and were still held by the sheriff of Ellis County, Kansas, by virtue of a writ of attachment issued in the suit mentioned in said bond. That said representations were false and fraudulent, and made knowing they were false, for the purpose of inducing said defendants to sign said bond, and that said defendants were induced to execute said bond by said false and fraudulent representations.

But the court refused to allow said evidence to be given, to which ruling of the court the defendants then and there excepted.

And after the closing of the testimony in said cause, the court, after instructing the jury orally, instructed the jury in writing, among other things, as follows, to wit:

"The assignment of November 1st, 1872, by Green to Tate, transferred, under the evidence in this action, the bond sued on in this
35 case, with the right to Tate to sue for Green's interest therein."

To the giving of which instruction the defendants' counsel at the time objected, but the court overruled said objection, and gave said instruction; to which ruling the defendants' counsel then and there excepted.

And the court further instructed the jury in writing as follows, to wit:

"If Slavens, before the assignment to him of Ferguson, Slavens & Co.'s claims against Myers & Green, had notice of the assignment of the bond in suit to Tate, you will disallow the defendants' so called set off."

To the giving of which instruction the defendants' counsel objected, but the court overruled said objection, and gave said instruction; to which ruling of the court the defendants' counsel then & there excepted.

And the court further instructed the jury in writing as follows, to wit:

"If Slavens had such information or knowledge as to the assignment to Tate as would be sufficient to put any reasonable man upon the inquiry, when such inquiry reasonably followed up would have led to an ascertaining of the truth, he had sufficient notice of such assignment."

To the giving of which instruction the defendants' counsel objected, but the court overruled said objection and gave said instruction; to which ruling of the court the defendants' counsel then & there excepted.

And the court further instructed the jury in writing as follows, to wit:

"If the firm of Myers & Green, on the 18th day of May, 1874, transferred the judgment and bond by a written assignment, and in such assignment recited that they had theretofore sold the demand against George & Brothers to Tate, and that the bonds connected therewith belonged to Tate, then any notice to Slavens, after such sale, of such sale would prevent the set off in this action, provided such notice
36 was before he obtained the set off."

To the giving of which instruction the defendants' counsel objected, but the court overruled said objection and gave said instruction; to which ruling of the court the defendants' counsel then & there excepted.

And the court further instructed the jury in writing as follows, to wit:

"An assignment of the claim in suit against George Brothers, or an assignment of the judgment rendered thereon, would also transfer the bond sued on in this action."

To the giving of which instruction the defendants' counsel objected, but the court overruled said objection and gave said instruction; to which ruling of the court defendants' counsel at the time excepted.

And the court further instructed the jury in writing as follows, to wit:

"If the defendant Slavens, before the assignment to him of the claim of Ferguson, Slavens & Co., had notice of the assignment to Tate of the Myers & Green claim against George & Brothers, you will not allow him or any of the defendants any set off whatever."

To the giving of which instruction the defendants' counsel objected, but the court overruled said *said* objection and gave said instruction; to which ruling of the court the defendants' counsel at the time excepted.

The defendants' counsel asked the court to instruct the jury as follows, to wit:

"The interest of said Green in said demand has not been proved; the interest of partners in the property of the firm depends on the condition of the accounts between the partners, and the mere statement that Myers & Green were equal partners in business does not show what the interest of either may be in any particular portion of the property."

But the court refused to give said instruction; to which ruling of the court the defendants' counsel then & there excepted.

37 At the request of the defendants, the court also instructed the jury as follows:

"The written assignment of Nov. 1st, 1872, in evidence, does not purport to, and therefore does not convey the interest of Myers & Green in the claim therein mentioned to the plaintiffs; but merely the interest of William Green in said demand."

And because the several matters aforesaid do not appear of record in said cause the said defendants pray, at the time of said trial, that this bill of exceptions be by the court allowed, signed, sealed, and made a part of the record of said cause; which is accordingly done.

C. G. FOSTER, *Judge.*

(Endorsed:) No. 1915. Samuel W. Tate vs. M. B. George et al. Bill of exceptions. Filed Jan'y 5, 1878. A. S. Thomas, clerk.

And on this day, to wit, Febr'y 11, 1878, the defendants, by their attorneys, filed in the clerk's office of said court his supersedeas bond in said entitled action, which said supersedeas bond is in the words and figures following, to wit:

Supersedeas bond.

Circuit court of the United States for the circuit and district of Kansas.

Know all men by these presents that we, James W. L. Slavens, as principal, and Howard M. Holden, John H. Mansur, and William C. Obum, as sureties, are held and firmly bound unto Samuel W. Tate in the sum of twenty-four thousand dollars, to be paid to the said Samuel W. Tate, his executors and administrators, to the payment of which, well and truly to be made, we bind ourselves, and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 31st day of January, 1878.

The condition of this obligation is such that whereas the said
38 Samuel W. Tate has recovered a judgment in the circuit court of the United States for the district of Kansas against Moses B. George, William L. George, John E. George, James B. George, and James W. L. Slavens for the sum of twelve thousand two hundred and three and $\frac{31}{100}$ dollars and costs of suit, which said judgment was rendered on the day of December, A. D. 1877; and whereas the said Moses B. George, William L. George, John E. George, James B. George, and James W. L. Slavens, in order to obtain a reversal of the same, have sued out a writ of error to the Supreme Court of the United States:

Now, therefore, if the above-named Moses B. George, William L. George, John E. George, James B. George, and James W. L. Slavens shall prosecute their said writ of error to effect, and shall answer all damages and costs and pay the said judgment if they shall fail to make good their plea, then this obligation shall be void; *then this obligation shall be void;* otherwise the same shall remain in full force and virtue.

JAMES W. L. SLAVENS. [SEAL.]
HOWARD M. HOLTON. [SEAL.]
JOHN H. MANSUR. [SEAL.]
WILLIAM C. OBUM. [SEAL.]

Executed and delivered in the presence of—
L. C. SLAVENS.

This bond is satisfactory to me.
Feb'y 8, 1878.

JOHN K. CRAVENS,
Attorney for Tate.

Approved Feb'y 8, 1878.

C. G. FOSTER, *Judge.*

(Endorsed:) No. 1915. Tate vs. M. B. George et al. Supersedeas bond. Filed Feb'ry 11, 1878. A. S. Thomas, clerk.

39 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of

America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the records of all the proceedings, excepting the transcript of proceedings in the district court of Wyandott County, Kansas, the demurrer filed June 7, 1877, order for leave to file amended petition, and defendants' motion for a new trial in the case of Samuel W. Tate vs. M. B. George & Brothers et al., No. 1915, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 30th day of March, A. D. 1878.

[SEAL.] A. S. THOMAS, *Clerk.*

40 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Samuel W. Tate, plaintiff, and Moses B. George, William L. George, James B. George, and John E. George, copartners as M. B. George & Brothers, & J. W. L. Slavens, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 26th day of January, A. D. 1878.

[SEAL.] A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

NELSON COBB,
L. C. SLAVENS,
Att'ys for Pl'ff.

Allowed.

C. G. FOSTER, *Judge.*

(Indorsed:) No. 1915. Samuel W. Tate vs. M. B. George & Brothers et al. Writ of error. Filed Feb'ry 12, 1878. A. S. Thomas, clerk.

41 *Citation.*

United States of America to Samuel W. Tate, greeting:

You are hereby cited and admonished to appear and be at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October next, pursuant to a writ of error filed in the

clerk's office of the circuit court of the United States for the district of Kansas, wherein James W. L. Slavens, Moses B. George, William L. George, John E. George, and James B. George are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable C. G. Foster, one of the judges of the circuit court of the United States for the district of Kansas, this the 8th day of February, 1878.

C. G. FOSTER, *Judge.*

I acknowledge service of the above Feb'y 9th, 1878.

JOHN K. CRAVENS,
Att'y for Sam'l W. Tate.

(Indorsed:) No. 1915. Citation. Filed Feb'ry 12, 1878. A. S. Thomas, clerk.

42 *Assignment of errors.*

MOSES B. GEORGE, WILLIAM L. GEORGE, John E. George, and James W. L. Slavens, plaintiffs in error,
vs.
SAMUEL W. TATE, DEFENDANT IN ERROR.

Of October term, in the year of our Lord one thousand eight hundred and seventy-eight.

Afterwards, on the of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Moses B. George, William L. George, John E. George, James B. George, and James W. L. Slavens, by Nelson Cobb and L. C. Slavens, their attorneys, and say that in the record of the proceedings aforesaid there is manifest error, in this, to wit:

The court erred in permitting the defendant in error to read in evidence at said trial the written assignment dated November 1st, 1872, signed "Myers & Green, by Wm. Green," and purporting to
43 assign to Samuel W. Tate William Green's interest in the judgment therein mentioned in favor of Myers & Green and against W. B. George & Brothers. This testimony was irrelevant, and said assignment conveyed no interest in said judgment, for the reason that there was no evidence that any of said judgment-debtors ever consented that any interest less than the whole of said judgment might be assigned to said Tate. And further, because the interest of said William Green in said judgment, if assignable, could not be ascertained until after an accounting between him and his partner Myers, and the settlement of their partnership business, which was not shown.

2nd. The court erred in refusing to allow the plaintiffs in error to introduce evidence to prove that they were induced to execute the bond sued on in this action by the false and fraudulent representations of Myers & Green and their agents and attorneys, as stated in the bill of exceptions.

3d. The court erred in giving to the jury the instruction that "The assignment of November 1st, 1872, by Green to Tate, transfer'ed,
44 under the evidence in this action, the bond sued on in this case, with the right of Tate to sue for Green's interest therein."

4th. The court erred in instructing the jury as follows: "If Slavens, before the assignment to him of Ferguson, Slavens & Co.'s claim against Myers & Green, had notice of the assignment of the bond in suit to Tate, you will disallow the defendants' so-called set-off."

5th. "If Slavens had such information or knowledge of the assignment as would be sufficient to put any reasonable man up' the inquiry, when such inquiry reasonably followed up would have led to an ascertaining of the truth, he had sufficient notice of such assignment."

6th. The court erred in the following instruction to the jury: "If the firm of Myers & Green, on the 18th day of May, 1874, transferred the judgment and bond by a written assignment, and in such assignment recited that they had theretofore sold the demand against George & Brothers to Tate, and that the bonds connected therewith belonged to Tate, then any notice to Slavens, after such sale, of such sale would prevent the set off in this action, provided such notice was before he obtained the set off."

45 7. The court erred in instructing the jury as follows: "An assignment of the claim in suit against George Brothers, or an assignment of the judgment rendered thereon, would also transfer the bond sued on in this action."

8. The court erred in instructing the jury that "If the defendant Slavens, before the assignment to him of the claim of Ferguson, Slavens & Co., had notice of the assignment to Tate of the Myers & Green claim against *against* the George Brothers, you will not allow him or any of the defendants any set off whatever."

9th. The court erred in refusing to instruct the jury, when requested so to do by defendants, as follows, to wit: "The interest of said Green in said demand has not been proved. The interest of partners in the property of the firm depends on the condition of the accounts between the partners, and the mere statement that Myers & Green were equal partners in business does not show what the interest of either may be in any particular portion of the property."

46 And said M. B. George, William L. George, John E. George, James B. George, and James W. L. Slavens pray that the judgment aforesaid may be reversed, annulled, and held for nought, and that they may be restored to all things which they have lost by occasion of the said judgment.

NELSON, COBB, & SLAVENS,
Att'ys for Pl'ffs in Error.

(Indorsement on cover:) No. 431. Moses B. George, William L. George, James B. George, and John E. George, copartners as M. B. George & Brothers, & J. W. L. Slavens, plaintiffs in error, vs. Samuel W. Tate. Kansas C. C. U. S. Filed 19th June, 1878.

ADDITION TO RECORD 431.

1 U. S. circuit court, dist. of Kansas.

SAMUEL W. TATE
vs.
MOSES B. GEORGE, WILLIAM L. GEORGE, John E. George & James B. George and James W. L. Slavens.

Now come the defendants and move the court that the verdict be vacated and for a new trial on the grounds—

1st. For excessive damages appearing to have been given under the influence of passion or prejudice.

2nd. For error in the assessment of the amount of the recovery, the same being too large.

3rd. That the verdict is not sustained by sufficient evidence, and is contrary to law.

4th. For error in law occurring at the trial and excepted to by the defendant.

5th. Because the court erred in ruling at the trial that the defendant should not be allowed to prove the false and fraudulent representations of Myers & Green, by their agents, at the time of making the bond
2 in suit and immediately, previous thereto, that the cattle mentioned in the bond in suit were already attached and held by the sheriff of Ellis County, under said attachment, and thereby induced the defendants to execute the bond in question, and in rejecting said testimony when offered; to which ruling the counsel for the defendant then and there excepted.

6th. That the court erred in refusing to instruct the jury as requested by defendants as follows:

"That the interest of said Green in said demand has not been proved; the interest of partners in the property of the firm depends on the condition of the account between the parties, and the mere statement that Myers & Green were equal parties in business does not show what the interest of either was in any particular portion of the property."

To which refusal of the court the counsel for defendants then and there excepted.

7. That the court erred in instructing the jury as follows:
3 "That an assignment of the claim in suit against George & Brothers, or an assignment of the payment thereon, would also transfer the bonds sued on in this action," to which instruction the defendants excepted.

8. That the court erred in instructing the jury as follows: "If Slavens before the assignment to him of Ferguson, Slavens & Co.'s claim against Myers & Green, had notice of the assignment of the bond in suit to Tate, you will disallow the defendants' so-called set off," to the giving of which instruction, the counsel for defendants then and there excepted.

9th. The court erred in instructing the jury as follows: "The assignment of November the first, 1872, by Green to Tate, transferred, under

the evidence in this action, the bond sued on in this case, with the right to Tate to sue for Green's interest therein;" to the giving of which instruction the counsel for defendants then and there excepted.

10th. The court erred in instructing the jury as follows: "If the defendant Slavens, before the assignment to him the claim of Ferguson,
4 Slavens & Company, had notice of the assignment to Tate of the Myers & Green claim against George & Brothers, you will not allow him or any of the defendants any set-off whatever," to which instruction the defendants then and there excepted.

11th. The court erred in instructing the jury as follows: "If Slavens had such information or knowledge, as to the assignment to Tate, as would be sufficient to put any reasonable men upon the inquiry when such inquiry, reasonably followed up, would have led to an ascertaining of the truth, he had sufficient notice of such assignment," to which instruction the counsel for defendants then and there excepted.

12th. The court erred in instructing the jury as follows: "On this bond, if you find for the plaintiff, you will allow him interest from the time of the maturity of the bond, which 60 days from the 14th day of May, 1874," to which instruction the defendants then and there excepted.

13th. The court erred in instructing the jury that "The written assignment read in evidence, dated November 1st, 1872, assigned
5 to Tate the interest of Green in the claim therein mentioned, against M. B. George & Brothers, and also operated to assign to Tate the bond in suit, so that he could sue in his own name for whatever interest Green had in the claim aforesaid at the time of the assignment, and that there was some evidence given that Myers & Green were equal partners, and that if were true, Tate acquired a half interest in said bond," to which instruction the counsel for the defendants then and there excepted.

14th. The court erred in admitting in evidence the written assignment, dated November 1st, 1872, purporting to assign the individual interest of William Green in the claim of the firm of Myers & Green against M. B. George & Brothers, therein mentioned, and the deposition of Green to prove the execution of said assignment against the objection of defendant's counsel, to which ruling of the court defendants' counsel then and there excepted.

16th. The court erred in admitting evidence to prove that de-
6 fendant Slavens had notice prior to May 18th, 1874, that Myer & Green had assigned to Tate, the pl'ff, their claim against the firm of M. B. George & Brothers, mentioned in the bond in suit; to the admission of which evidence the counsel of def'ts then and there objected, and excepted to the ruling of the court allowing said evidence to be admitted at said trial.

17th. The court erred in the admission of other testimony, to which counsel for def't objected at the time and excepted to.

18th. The defendants were surprised at the testimony of the plaintiff's witnesses who testified that William Green stated in his testimony in the trial of the case of Myers & Green vs. M. B. George and Brothers, in the Ellsworth district court of Ellsworth County, that Myers & Green had transferred & assigned the said claim then in suit to this plaintiff Tate, which surprise def'ts could not by ordinary prudence have guarded against.

L. C. SLAVENS,
NELSON COBB,
Atty's for Def'ts

7

No. 1915. Samuel W. Tate vs. M. B. George et al. Motion for new trial. Filed Dec. 15, 1877. A. S. Thomas, clerk. L. C. Slavens, N. Cobb, sol'rs def't.

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of the motion for new trial in the case of Samuel W. Tate vs. Moses B. George et al, No. 1915 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 16th day of December, A. D. 1879.

A. S. THOMAS, *Clerk*,
By J. N. STRICKEN, *Deputy*.

8 (Endorsed:) No. 1915. Samuel W. Tate vs. Moses B. George et al. Copy of motion for new trial.

In the Supreme Court of the United States of America. October term, A. D. 1879.

MOSES B. GEORGE, WILLIAM L. GEORGE, JAMES B. George, and John E. George, copartners as M. B. George & Brothers, and James W. L. Slavens, plaintiffs in error,
vs.
SAMUEL W. TATE, DEFENDANT IN ERROR. } No. 431.

Whereas the clerk of the circuit court of the United States for the district of Kansas has omitted to include in the transcript of the record in said cause the motion for a new trial filed in said cause in the court below, it is hereby agreed that the certified copy of said motion for a new trial hereto attached & duly certified by said clerk, under the
9 seal of said court, may be filed and made part of the record of this cause in the Supreme Court of the United States if necessary to perfect such record.

December 30th, 1879.

NELSON COBB,
Att'y for Pl'ff in Error.
JOHN K. CRAVENS,
Att'y for Def't in Error.

(Endorsed:) 1879. October term. In Supreme Court of the United States. No. 431. M. B. George et al., pl'ffs in error, vs. S. W. Tate, def't in error. Certified transcript of motion for new trial. Stipulation that same may be filed as part of the record. Filed 9th January, 1880.

NO. 431.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

MOSES B. GEORGE, WM. L. GEORGE, JAMES B. GEORGE, JOHN E. GEORGE AND JAMES W. L. SLAVENS,
Plaintiffs in Error.

vs.

SAMUEL W. TATE,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

L. C. Slavens,
Nelson Cobb,
Attorneys for Plaintiffs in Error.

I. P. Moore, Printer, Kansas City, Mo.

NO. 431.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

MOSES B. GEORGE, WM. L. GEORGE, JAMES B. GEORGE, JOHN E. GEORGE AND JAMES W. L. SLAVENS,
Plaintiffs in Error.

vs.

SAMUEL W. TATE,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

STATEMEN OF THE CASE.

This action was brought upon a bond, executed by Plaintiffs in Error to Myers & Green, and by the latter assigned to the Defendant in Error, Tate, May 18th, 1874. The bond is as follows:

"*Know all men by these presents:* That we, M. B. George, William L. George, James B. George and John E. George, copartners, doing business under the firm name and style of M. B. George & Brothers, as principal, and J. W. L. Slavens, as surety, are held and firmly bound unto John Myers and William Green in the full sum of ten thousand dollars, to the true payment whereof we hereby bind ourselves, our heirs, extcutors, administrators and assigns, firmly by these presents. Signed, sealed and dated this 19*th day of September, A. D.* 1872.

The condition of the foregoing bond is this: That, whereas, the said Myers & Green have heretofore commenced, and now have pending, a civil action in the District Court of Ellsworth County, State of Kansas, against said M. B. George & Brothers, to recover the sum of $8,509.50, and have also filed their affidavit according to law for a writ or writs of attachment to issue for the property of said M. B. George & Bros.; and, whereas, writs of attachments have been issued and are now in the hands of the sheriffs of those counties to which said writs of attachment have been directed; and, whereas, the said M. B. George & Bros. have property within the jurisdiction of the said court, about to be attached, under and by virtue of said writs of attachment; and, whereas, the said Myers & Green have agreed and promised the said M. B. George & Bros. that they, Myers & Green, will recall said writs of attachment upon their, M. B. George & Bros., executing a bond, with approved security, to pay the amount of the judgment and costs which may be rendered in said action against said M. B. George & Bros.

Now, therefore, if we, the foregoing named bounden parties, shall well and truly pay to Myers & Green the *amount* of the judgment and costs which may be rendered in the foregoing named action by the said District Court, in sixty days from the rendition thereof, then the foregoing bond to be void, otherwise to be and remain in full force and effect.

In Witness Whereof, we have hereunto set our hands and seals this, the 19th day of September, A. D. 1872."

(Signed,) M. B. GEORGE & BROS. [SEAL.]
J. W. L. SLAVENS, [SEAL.]

Myers and Green were, at the time of the execution of this bond, partners, under the firm name of Myers & Green.

Tate, the Defendant in Error, claims that this bond was assigned to him by two different assignments in writing:

First—By virtue of an assignment of *all the interest of Wm. Green* in the *claim* of Myers & Green against M. B. George & Bros., (then in suit in the District Court of Ellsworth County,

Kansas,) which assignment was made November 1st, 1872, and is as follows, viz:

MYERS & GREEN,
vs.
M. B. GEORGE & BROS.

I, *Wm. Green*, in consideration of $8,509.00, (eight thousand, five hundred and nine dollars,) to me paid by Samuel W. Tate, of Llano County, Texas, do hereby assign to the said S.W. Tate *the within instrument* and *all my interest* in the covenants and agreements therein contained; that I hereby assign, turn over and convey to and for the benefit of S. W. Tate, of the County of Llano, State of Texas, *all my right and interest* in a certain suit now pending in the District Court of Ellsworth County, Kansas, wherein I, *Wm. Green*, and J. J. Myers are plaintiffs, and M. B. George & Bros. are defendants. And *I* constitute the said S.W. Tate *my* attorney irrevocable, with full power, at his own charge, in *my* name, to take all legal measures which may be necessary or proper for the recovery or enjoyment of the assigned premises, with power of substitution.

Witness my hand and seal this 1st day of November, A. D. 1872.

MYERS & GREEN,
By WM. GREEN.

Executed in the presence of G. A. Mills.

State of Kansas, County of Ellsworth:

Personally appeared before me, James Miller, Notary Public in and for the County of Ellsworth, William Green, and A. G. Mills as attest, and declared the signature to the above and foregoing to be of *his* free will and accord.

JAMES MILLER, *Notary Public.*

The defendants by their counsel objected to the introduction in evidence of the above assignment. The portion of the bill of exceptions herein, which shows this objection was made, is as follows.

"And the defendants counsel at the time objected to the introduction of said written assignment in evidence, for the reason that it was irrelevant and only purported to assign and

transfer to the plaintiff, Tate. The interest of Wm. Green in the claim therein mentioned against M. B. George & Bros., whose interest therein, if assignable, could not be ascertained until after an accounting between him and J. J. Myers, his partner, and the settlement of their partnership business, which has not been shown.

But the court overruled said objections and admitted said assignment to be read in evidence, the defendants counsel there excepted.

And there was no other *written instrument*, written within, endorsed upon, or attached to said assignment in writing above set forth."

(*See printed record herein, page* 18.)

Second—The second assignment under which the Defendant in Error, Tate, claims that this bond was assigned to him, is dated *May 13th*, 1874, and is as follows, viz:

JOHN J. MYERS AND WM. GREEN, Co-partners as Myers & Green, *Plaintiffs*,

vs.

MOSES B. GEORGE, WM. L. GEORGE, JAS. B. GEORGE AND JOHN E. GEORGE, Co-partners as M. B. George & Bros., *Defendants*, 1874—May 14th—Judgement against the said Defendants, M. B. George & Bros., in favor of said Myers & Green. Debt, $9,758.00; costs, $———

Whereas, said Myers & Green, since the commencement of the above suit, and before the said judgment, sold their demand against the defendants to Samuel W. Tate for a debt owed by Myers & Green to Tate, and said suit has been carried on in the name of Myers & Green to judgment, and the said judgment and the bonds and instruments connected therewith and taken in said suit by the plaintiff from the defendants and their sureties belong to said Tate: Therefore, we, the said Myers & Green, hereby, for value received by us, from said Tate, do sell, transfer, set over, and assign to the said Samuel W. Tate, the said judgment and all bonds and instruments taken therein, and connected therewith during the progress of

said suit, and all our right and title, therein and thereto, with full power to said Tate to collect, sue the same, and to receipt thereon as fully as we or either of us can do.

As witness our hands, at Ellsworth, in the State of Kansas, the 18th *day of May, A. D.* 1874.

MYERS & GREEN.

In this suit by Tate, on this bond, in the Court below, the Plaintiffs in Error, for their affirmative defense, answered,

First—That they were induced to sign said bond by the false and fraudulent representations of said Wm. Green, and J. G. Spivey, an Attorney of said Myers & Green who represented to defendants that 675 head of cattle, which said M. B. George & Brothers had sold but had not been delivered to the purchasers, had been attached in the suit of Myers & Green vs. M. B. George & Brothers, and were then held by virtue of such attachment, and,

Second—By way of set-off, that said Myers & Green were indebted to Ferguson, Slavens & Co., of Kansas City, (of which firm said J. W. Slavens was a member) in a sum larger than the judgment, obtained by Myers & Green against M. B. George & Brothers (referred to in the bond herein sued on,) and that on the last of July, 1874, and before he, Slavens, had any notice of the assignment to Tate, by Myers & Green, of the bond in suit, said firm of Ferguson, Slavens & Co., for value, assigned to him, Slavens, their claim against Myers & Green, and that he was still the owner of this claim, which was due and unpaid, and that Myers & Green were insolvent.

To these defenses, the Defendant in Error, filed a general denial.

ASSIGNMENT OF ERRORS.

We claim that the Court erred,

First—In permitting the Defendant in Error, to read in evidence at the trial, the written assignment, dated November 1, 1872, purporting to assign to Samuel W. Tate, *Green's interest* in the claim therein mentioned, against M. B. George & Brothers, and in favor of Myers & Green, because there was no

evidence that said M. B. George & Brothers or either of them, ever consented that any interest, less than the whole of said claim, might be assigned to Tate; and because, further, the interest of Green in said claim, if assignable, could not be ascertained until after an accounting between him and his partner, Myers, and the settlement of their partnership business, which was not shown.

Second—The Court erred in refusing the Plaintiffs in Error to prove that they were induced to execute the bond sued on, by the false and fraudulent representations of Myers & Green and their Attorney, Spivey, made to them at the time of the execution of said bond, that cattle of M. B. George & Brothers, had been attached and were still held by the Sheriff of Ellis County, Kansas, by virtue of a writ of attachment, issued in the suit mentioned in said bond; that said representations were false and fraudulent, and made, knowing them to be false, for the purpose of inducing said Plaintiffs in Error to sign said bond, and that they were thereby induced to execute said bond.

(*See printed record, page* 20.)

Third—The Court erred in instructing the jury, that "The assignment of November 1, 1872, of Green's interest to Tate, transferred, under the evidence in this action, the bond sued on in this case, with the right of Tate to sue for Green's interest therein."

Fourth—The Court erred in instructing the jury that, "If Slavens, before the assignment to him of Ferguson, Slavens & Co.'s claim against Myers & Green, had notice of the assignment of the bond in suit to Tate, you will disallow the defendants' so-called set-off."

Fifth—"If Slavens had such information or knowledge of *the* assignment to Tate, as would be sufficient to put any reasonable man upon the inquiry, when such inquiry reasonably followed up would have led to an ascertaining of the truth, he had sufficient notice of such assignment."

Sixth—The Court erred in instructing the jury, that, "If the firm of Myers & Green, on the 18th day of May, 1874,

transferred the judgment and bond by a written assignment, and in such assignment recited that they had therefore sold the demand against George & Brothers to Tate, and that the bonds connected therewith, belonged to Tate, then any notice to Slavens after such sale, of such sale, would prevent the set-off in this action, provided such notice was before he obtained the set-off."

Seventh—The Court erred in instructing the jury, that, "An assignment of the *claim* in suit against George & Brothers, *or* an assignment of the *judgment* rendered thereon, would also transfer the bonds sued on in this action."

Eighth—The Court erred in instructing the jury, that, "If the Defendant, Slavens, before the assignment to him of the claim of Ferguson, Slavens & Co., had notice of *the* assignment to Tate of the Myers & Green *claim* against the George Brothers, you will not allow him or any of the Defendants any set-off whatever."

Ninth—The Court erred in refusing to instruct the jury, at the request of the Defendants, that, "The interest of said Green in said demand has not been proved. The interest of partners in the property of the firm depends on the condition of the accounts between the partners, and the mere statement that Myers & Green were equal partners in business, does not show what the interest of either may be in any particular portion of the property."

POINTS OF LAW AND FACTS.

On the trial below, witnesses for Tate, testified, in substance, that at the trial of the suit of Myers & Green *vs.* M. B. George & Brothers, at Ellsworth, May 14, 1874, W. M. Green testifies that he had theretofore assigned to Tate all *his* interest in the claim then in suit, or that Myers & Green had assigned to Tate the claim in suit. Some of the witnesses testified that he said he had assigned all *his* interest, others that he said Myers & Green had no interest in the claim, but had assigned it to Tate. They all testify that Slavens was present at said trial when Green so testified.

(*See page* 19 *of printed record.*)

Slavens testified that he never had any notice of any assigment of said claim of Myers & Green, or of the bond sued on, or the judgment of Myers & Green *vs* M. B. George & Brothers to Tate, until after the commencement of this suit by Tate.

(*See page* 20 *of printed record.*)

Whatever Green's exact statement was at that trial, he evidently referred to the written assignment of *his* interest, dated November 1, 1872, herein before set forth, because, on the trial of this cause below, their written assignment of *Green's interest* to Tate, was the *only* assignment offered in evidence, and the only one claimed to have been made, except the one dated May 18, 1874, which was *after* Green testified as above, and *after* the judgment was rendered in the case in which he so testified. The petition sets up only the two written assignments, so that the testimony of Green at that trial, when Slavens was present, could only affect Slavens with notice of the assignment of November 1, 1872, above set forth, which only purports to assign to Tate, Green's interest in the claim of Myers & Green *vs.* M. B. George & Brothers.

"The foregoing is all the evidence given on the trial of this cause tending to prove notice to Slavens, before the commencement of this action, of the assignment dated, Novembre 1, 1872, heretofore set forth. And no *other evidence* was given at said trial *tending* to show notice to said Slavens before the commencement of this action, of the assignment dated May 18, 1874, or tending to show information or knowledge on his part, before the commencment of this action, or at all calculated to put him on inquiry as to the existance of such assignment."

"Evidence was also given on the trial of this action, tending to show that Myers & Green were equal partners in business at the time the assignment, of November 1, 1872, was made, and at the time the said assignment of May 18, 1874 was made; but there was no other evidence given, tending to show what the interest of either of said partners was, in their said claim against said M. B. George & Brothers, at the time of either of the assignments to Tate, hereinbefore set forth."

"No other evidence was given on the trial, that M. B. George & Brothers, or either of said firm, ever consented that Myers & Green might assign to Samuel W. Tate, this Plaintiff, any portion of said claim, of Myers & Green, against said M. B. George & Brothers, less than the entire amount thereof."

"Evidence was also given on the trial of this cause that on and prior to May 14, 1877, said Myers & Green were indebted to Ferguson, Slavens & Co., in a sum greater than the amount of said judgment of Myers & Green, against M. B. George & Brothers, dated May 14, 1874, for $9,758.00, and ninety dollars costs, given in evidence on the trial of this cause; and that indebtedness was due and unpaid, and that on the last of July, 1874, said firm of Ferguson, Slavens & Co., for a valuable consideration, assigned and transfered their said claim and demand, which was still unpaid, against said Myers & Green, to J. W. L. Slavens, a Defendant in this action."

The foregoing is quoted from the bill of exceptions which also shows it was proved that, "The firm of Myers & Green was insolvent." (*See printed record pages* 20 *and* 21.)

"We claim that the assignment of November 1, 1872, purporting to assign to Tate, *Green's interest* in the claim of Myers & Green *vs.* M. B. George & Brothers, did not transfer the bond to Tate, for any purpose, because,

First—Green's interest in that particular debt, if it had been ascertained and defined, could not have been vested in Tate. by assignment, without the consent of M. B. George & Brothers. A creditor is not allowed to split up his claim and compel his debtor to pay it to different parties instead of one, as his contract provides.

See Mandeville vs. Welsh, 5 Wheat, 277.
Love vs. Fairfield, 13 Mo., 300.

Second—But it was not shown what *Green's interest* in this particular debt of Myers & Green was. The interest of one partner in any specific property of the firm cannot be known until after a settlement of partnership debts, and an accounting be-

tween the partners. And if the partnership is insolvent, neither partner can have any specific interest in any of the partnership property.

The Defendant in Error, Tate, proved by his own testimony that the firm of Myers & Green were insolvent when the assignment of *Green's interest* in this particular claim was made, November 1st, 1872.

(*See printed record, page* 21.)

In the United States vs. Hack et al., 8 Peters, 275, the Court says (p. 275): "It is a rule too well settled to be now called in question, that the interest of each partner in the partnership property is his share of the surplus, after the partnership debts are paid."

And in Lyndon vs. Gorham et al., 1 Gallison Rep., p. 368, Judge Story says (p. 368): "The general rule undoubtedly is, that the interest of each partner in the partnership funds is only what remains after the partnership accounts are taken; and unless upon such account the partner be *a creditor* of the fund he is entitled to nothing. And if the partnership *be insolvent*, the same effect follows."

In the above case, the learned Judge further says: "But I have been pressed with the common case of a separate execution against the tangible partnership property, in which it is said, that the moiety of the judgment debtor may be sold on the execution. There are certainly decisions which countenance this opinion, and perhaps it may be considered that at law the Sheriff has a right to seize such property in execution. But still, it by no means follows that he can sell and convey an indefeasable title to a purchaser of a moiety of the property. He may sell the interest of the partner therein, but he sells it *cum onere*; and although the parties may be driven into a Court of Equity, to ascertain their respective rights, yet if upon the whole it appears that the judgment debter had a nominal interest only in the fund, I do not think that the authorities which are cited show that a greater interest can be conveyed under the execution, *and if the partnership be insolvent, that any interest can be conveyed.*"

In Fox vs. Hanburg, Lord Mansfield says: "No person deriving under a partner can be in a better condition than the partner himself." * * * * The same doctrine is explicitly avowed in the Court of Exchequer, in Field vs. ——— (4 Ves, Jun., 396), where the Court says: "The right of the separate creditor under the execution depends upon the interest each partner has in the joint property. With respect to that, we are of opinion that the *corpus* of the partnership effects, is joint property, and that *neither* partner, *separately*, has *any*thing in that *corpus;* but the interest of each is only his share of what remains after the partnership accounts are taken."

This is the law in Kansas, where this suit was brought.

In Torrent vs. Swain. 15 Kan. Rep., page 146, the Court says that no member of a co-partnership "has any specific interest in any article of property belonging to the co-partnership. His interest is merely to share in the profit, or profit and loss, and to receive dividends made from time to time, and at the final closing up of the co-partnership; and he really has no interest as an individual in any *specific article* of the property belonging to the co-partnership."

And in Swallow vs. Thomas, 15 Kan., 66, the Court says (p. 69): "In fact, a partner's interest in the partnership property is a right to his share of whatever remains after the partnership debts are paid."

It will hardly be claimed that this assignment of November 1st, 1872, transferred the interest of both Myers & Green in the claim therein mentioned. It is as clearly and positively restricted to Green's interest alone, as it is possible for language to express that intention.

The words used to describe the interest assigned embody a definite meaning, and involve no contradiction of other parts of the assignment.

In such case, says Dwaris, "that meaning apparent on the face of the instrument, is the one which *alone* we are at liberty to say was intended to be conveyed. In such case there is no room for construction. That which the words declare, is the meaning of the instrument, and neither the Courts nor the

Legislature have a right to add to or take away from that meaning."

(*See Potters, Dwaris, &c., page* 145.)

The fact that the name of Myers & Green, by Wm. Green, was signed to this assignment has no significance further than to show the consent of the firm to the assignment of *Green's interest* in that particular claim. But, as we have seen, since the firm of Myers & Green were insolvent, Green could have no interest in that particular claim to assign; and as nothing passed by the assignment purporting to assign Green's interest in this claim, it could not transfer the bond in suit to Tate for any purpose.

Third—But even if Green's interest in this claim had been shown, after an accounting and settlement of partnership affairs, still the assignment of his interest to Tate would not transfer the bond. The bond was not given to secure the claim. The obligors reserved the right to defeat the claim if they could, and gave the bond to pay the amount of the judgment that might be obtained.

The bond does not recite, or admit that M. B. George & Brothers owed Myers & Green anything. The consideration of the bond, as therein expressed, is the return of certain writs of attachments issued in the suit therein mentioned, and for this consideration, and none other, the obligors bind themselves to pay the amount of watever judgment may be rendered in said suit. The bond was in no sense an incident of the claim before the judgment was rendered, and hence a valid assignment of the claim before judgment would not transfer the bond; much less would the assignment of November 1st, 1872, transfer the bond.

But again, Green's interest in the *bond*, if ascertained, could not be assigned to Tate without the consent of the obligors, for the reasons above stated.

See 5 Wheat, 277 and 13 Mo., 300, above cited.

Now, while it may be true that Slavens is affected with notice of the assignment of November 1st, 1872, purporting to assign *Green's interest*, &c., because he was present at the trial

at Ellsworth when Green testified about it, and might have heard it by paying attention; there is absolutely *no evidence* that he had any notice of the written assignment of May 18th, 1874, (whereby Myers & Green assign to Tate the judgment and the bond herein sued on), until after he acquired his set-off. On the contrary, the evidence is that he had no notice of this last assignment until this suit was begun.

In view of these facts, the first, second and fifth instructions given by the Court are each erroneous, and taken together, are peculiarly vicious, and calculated to mislead the jury. They are as follows:

First—"The assignment of November 1st, 1872, to Tate, *transferred*, under the evidence in this action, *the bond sued on* in this case, with the right to Tate to sue for Green's interest therein."

Fifth—"An assignment of the *claim* in suit against George Brothers, *or* an assignment of the *judgment* rendered thereon, would transfer the bond sued on in this action."

Second—"If Slavens, before the assignment to him of Ferguson, Slavens & Co.'s claim against Myers & Green, had notice of *the* assignment of the bond in suit to Tate, you will disallow the Defendant's so called set-off."

The fifth instruction, discriminating between the *claim* and the *judgment* rendered thereon, declares that an assignment of *either* would transfer the bond. But, prior to the assignment of the judgment, on May 18th, 1874, there was no assignment of the *claim* to base the first part of this instruction upon, other than the assignment of Green's interest on November 1st, 1872, which, as we have seen, passed nothing.

Again, the second instruction is equivocal. To which of these two assignments does it refer? If to the one by Myers & Green, dated May 18th, 1874, it is erroneous, because there is no evidence that Slavens had any notice of that assignment before he acquired his set-off.

If, on the other hand, it refers to the assignment of Green's interest, November 1st, 1872, it is erroneous, because under the

evidence Green had no interest; and even if he had, it could not be assigned, for reasons already stated.

Now, the Court tells the jury, in the first instruction, that the assignment of November 1st, 1872, *transferred* the bond in suit to Tate, and in the second, that if Slavens had notice of *the* assignment of the bond to Tate before he acquired his set-off, they must not allow his set-off.

The jury knew, from the evidence, that Slavens acquired his set-off in July, 1874, and they also knew that by virtue of Green's testimony at the trial at Ellsworth, May 14th, 1874, in Slavens' presence, Slavens was affected with notice of the assignment of *Green's interest* in the claim vs. George Brothers to Tate, on the 1st of November, 1872; and the Court has instructed them that this assignment *transferred the bond* in suit to Tate, and that if Slavens had notice of *the* assignment of the bond in suit to Tate, before he obtained his set-off they must not allow his set-off. Under these instructions the jury were compelled to disallow the set-off, notwithstanding the fact that *Myers & Green* never assigned their claim, or the bond in suit, until they did it by their assignment of May 18th, 1874, and that Slavens had no notice of *that* assignment until after he acquired his set-off, which he obtained the July following.

The third instruction is also erroneous. It is as follows: "If Slavens had such information or knowledge as to *the* assignment to Tate as would be sufficient to put any reasonable man upon the inquiry, when such inquiry reasonably followed up would have led to an ascertaining of the truth, he had sufficient notice of *such* assignment."

While this instruction may have been drawn with a view to apply to *either* of the assignments set up in the petition, and offered in evidence, its chief design was to affect Slavens with notice of the assignment by Myers & Green, dated May 18th, 1874.

It was based upon the argument that Slavens, by being present when Green testified at the trial at Ellsworth, May 14th, 1874, was put upon the inquiry by Green's testimony, and that if he had reasonably followed up that inquiry thereafter, he would have learned of the assignment by *Myers &*

Green, made four days after Green testified, *to wit,* on the 18th of May, 1874, and that hence, he had *sufficient* notice of this last assignment.

But Green's testimony at the trial at Ellsworth, even if it were such as to put Slavens upon the inquiry at all, could only put him upon the inquiry as to what had already transpired. It could not have the effect of putting him upon the inquiry as to what might take place in the future. If, immediately after Green had testified at the trial at Ellsworth, Slavens had inquired of him or Tate as to the interest of Tate in the claim then in suit, and they had showed him the written assignment of November 1st, 1872, he would have learned that said assignment only purported to assign to Tate *Green's interest* in said claim, and that the bond had not been assigned to Tate. And he would have then had the right to obtain a set-off against the bond, without again inquiring whether *Myers & Green* had thereafter assigned to Tate the judgment obtained upon this claim, and the bond sued on. It was the duty of Tate, when Myers & Green made this assignment of the bond, May 18th, 1874, to notify Slavens of the fact, if he had desired to prevent his acquiring a set-off against Myers & Green. But this was not done, and on the last of July following, more than two months from the date of the assignment of the judgment and bond by Myers & Green to Tate, Slavens acquired his set-off against Myers & Green; and there is no evidence whatever that Slavens had any notice of this last assignment to Tate, which is the only one that transferred the bond to him. And it was for the very reason that he had no notice of this assignment that this instruction was drawn, attempting to make Green's testimony of the assignment of *his* interest on November 1st, 1872, put Slavens upon the inquiry as to this last assignment of May 18th, 1874, made four days after Green testified.

The fourth instruction is erroneous, because there is no evidence to sustain it. It is further vicious, because it attaches importance to the fact that in their assignment of May 18th, 1874, Myers & Green recited that they had theretofore sold to Tate their claim vs. George Brothers, and that Tate was then the owner of said claim, and all bonds connected therewith,

&c. It was bad enough for Tate to attempt to manufacture testimony, by having these recitals incorporated in the assignment of May 18th, 1874, but it was worse still for the Court to base an instruction upon such manufactured evidence.

(*See this instruction in full, page* 22, *printed record, and page — of this brief.*)

The sixth instruction is as follows: "If the Defendant, Slavens, before the assignment to him of the claim of Ferguson, Slavens & Co., had notice of *the* assignment to Tate of the *Myers & Green claim* against George Brothers, you will not allow him or any of the defendants any set-off whatever."

There is no evidence to sustain this instruction, as we have heretofore shown; the *Myers & Green* claim was not assigned to Tate until May 18th, 1874, after judgment was rendered upon it; and there is no evidence whatever that Slavens had notice of *that* assignment before he acquired his set-off.

In view of the rule as to the interest of a partner in specific property of the partnership, as stated in the cases from which we have quoted herein, it is evident that the Court below erred in admitting in evidence the assignment of November 1st, 1872, which only purported to assign to Tate Green's *interest* in the claim of Myers & Green vs. the George Brothers. And for the same reason, the Court also erred in refusing to instruct the jury at the request of defendants that "the interest of said Green in said demand has not been proved; the interest of partners in the property of the firm depends on the condition of the accounts between the partners, and the mere statement that Myers & Green were equal partners in business does not show what the interest of either may be in any particular portion of the property."

We desire to call attention to one more error of the Court below, and that is, the refusal to allow the defendants to prove that they were induced to execute the bond sued on by the false and fraudulent representations of Myers & Green and their agents and attorneys, made to defendants at the time; that the cattle of M. B. George & Brothers had been attached, and were then held by the Sheriff of Ellis County, Kansas, by

virtue of a writ of attachment issued in the suit mentioned in said bond, and that said representations were false, &c. (*See page* 21 *printed record.*) The pleadings raise this issue. And by reference to the first count of the petition, (*see pages* 1 *and* 2 *printed record*), it will be seen that plaintiff alleges in his petition that by virtue of certain writs of attachment the Sheriff had "seized and took, as the property of said M. B. Green & Brothers, to satisfy the said claim and demand of the said Myers & Green against said M. B. George & Brothers, six hundred and seventy-eight head of cattle, of the value of $15,000, and that said Sheriff *had* and *held* the said *cattle* on said writ of attachment on the 19th day of September, 1872, in the State of Kansas, and within the jurisdiction of said District Court, and on that day the said M. B. George & Brothers, and the said J. W. L. Slavens, defendants, *desiring to release* the said cattle from *the said attachment*," executed the bond sued on.

And in the same count of the petition, (*see bottom page* 2, *printed record*), the plaintiff states that on said 19th day of September, 1872, Myers & Green "then and there recalled all orders and writs of attachment theretofore issued in said action, and *fully released and delivered up to* the said M. B. George & Brothers and the said J. W. L. Slavens all of the said cattle, and fully performed all the conditions precedent of the said contract on the part to be performed, and then received the said bond *in lieu and stead of the said seizures* and the said attachment in said action, &c." In support of this allegation the plaintiff read in evidence (*see page* 21 *printed record*) a writ of attachment on which the Sheriff of Ellis County had "returned that he had, by virtue thereof, on the 17th day of September, 1872, attached 675 head of cattle in said county, *said to be* the cattle of M. B. George & Brothers, and that he had on the 19th day of September, A. D. 1872, released said cattle and returned said writ on the order of the plaintiffs, Myers & Green, in the said action in Ellsworth County, State of Kansas."

These allegations of the petition amount to an admission that the representations charged to have been made were made in fact, and that the defendants acted upon them, and the Sheriff's return above set forth was read in evidence to show

that said representations were true, although it only recites that the cattle attached were *said to be* the cattle of M. B. George & Brothers.

Should not the defendants have been allowed to prove that these representations were false, and that they were thereby induced to execute the bond?

That a false representation, made by the obligee fraudulently to procure a bond, and which induces the obligor to make it, avoids the bond, cannot be doubted.

That the representations which defendants below offered to prove were falsely and fraudulently made, might have induced the making of the bond, is apparent.

If the cattle were actually attached, M. B. George & Brothers had lost the control of them by a legal lien. But if the attachment was merely issued, the cattle were still in their control, and they were at perfect liberty to dispose of them by sale or otherwise, *bona fide*; as by the laws of Kansas a lien by attchment is created only by a levy of the attachment. (*Code of Civil Procedure, sec.* 206, *page* 667 *Gen. Stat. Kan.*)

It may be urged here, as it was in the Court below, that the recital in the bond sued on that the cattle were about to be attached precluded defendants from proving that they were induced to sign it by the fraudulent representations of Myers & Green that the cattle were already attached.

This recital in the bond might be some evidence that defendants were not deceived as to the attachment of the cattle, but it would be very slight evidence without it was also proved that defendants read the bond upon executing it.

Suppose that defendants had proved that at the time they executed the bond Myers & Green and their attorney represented that the cattle had been attached, and that said attorney, who drew the bond, represented that it recited that the cattle had been attached, or so misread it to them as to show that fact, and that defendants, being in haste, and relying upon the statement or reading of the bond by said attorney as correct, had signed without reading it, and that they believed from these representations that the fact was that the cattle had been attached and that the bond so recited, and that they

would not otherwise have signed; the exact fact, as we claim, would then have appeared to the Court and jury, that the bond had been drawn reciting that the cattle were about to be attached for the purpose that at the trial it might consist with other evidence that the cattle had not been attached, and it would have also appeared that the bond had been procured by the false and fraudulent representation that the cattle had been attached.

All this evidence would be clearly within the offer of evidence made by defendants and excluded by the Court.

The Court, as well as counsel for plaintiff below, seem to have gone upon the theory that the recital in a bond procured by fraud, *recitals and all*, estopped the obligor by his signature from avoiding the bond for such fraud—an opinion which we think will not be entertained by this Court.

L. C. Slavens,
Nelson Cobb,
Attorneys for Plaintiffs in Error.

OFFICE SUPREME COURT U. S.
FILED
DEC 1 1880
JAMES H. McKENNEY, Clerk.

IN THE SUPREME COURT

OF THE UNITED STATES.

M. B. GEORGE *et al.*,

Plaintiff in Error,

vs.

SAM'L W. TATE *et al.*

Defendant in Error.

REPLY TO WRITTEN ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

L. C. SLAVENS,
NELSON COBB,
Attorneys for Plaintiff in Error.

I. P. MOORE, Pr., 12 W. Missouri Ave.

IN THE SUPREME COURT

OF THE UNITED STATES.

M. B. GEORGE *et al.*,

Plaintiff in Error,

vs.

SAM'L W. TATE *et al.*

Defendant in Error.

REPLY TO WRITTEN ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

I.

We desire only to answer the argument of counsel for defendant in error respecting the alleged rights of the assignee, Tate, as against the set-off acquired by Slavens before he had notice of the assignment.

It is fallacious in that it assumes that the assignment to Tate was perfect and complete as to Slavens, the debtor, without notice to him.

The assignment of a chose in action is at best but an equitable assignment, notwithstanding the code allows the assignee to sue in his own name.

In McDonald & Graham *vs.* Kneeland *et al.*, 5 Minn., 352, the Court say: "The code has very wisely dispensed with the absurdity of requiring the assignee to use the name of the assignor in bringing suit, but it does not *therefore* follow that the legal estate in the thing assigned passes to the assignee. On the contrary, the only object of this provision of the code seems to have been to assimilate the practice in courts of law to that which always prevails in courts of equity, in permitting the real party in interest to sue in his own name. The interest, or right, acquired under the assignment is an equitable one, and governed by the same principles which courts of equity have always been wont to apply in like cases."

We understand the following propositions to be well established:

1. That an assignment of a chose in action is never complete, or perfected, as to the party owing the debt, without notice to him of the assignment. Though binding as between the assignor and assignee without such notice, it imposes no obligation whatever upon the person owing the debt. He is still at liberty to pay the debt, or any part thereof, to the asignor, and the payment will be good. This proposition admits of no doubt.

2. The acquisition of a set-off against the debt, is as legitimate as the payment of it. No distinction in principle can be shown.

On the above propositions, see Van Buskirk *vs.* Hartford Ins. Co., 14 Conn. R., 144; Bishop *vs.* Holcomb, 10 Conn. R., 446; Adams *vs.* Leavans, 20 Conn., R. 73.

In Bishop *vs.* Holcomb above, the Court say: "It must be admitted, we think, in conformity with the principles heretofore recognized in this State, and established in England as settled law, in order to *perfect* an assignment of a chose in action, at least against *bona fide* creditors and purchasers, that notice of such assignment must be given to the debtor within a reasonable time. * * * The want of the precaution of giving such reasonable notice is a neglect, on the part of the assignee, which will postpone his claims to all the

rights and equities *of the debtor himself*, and to the subsequently acquired *bona fide* rights of creditors and purchasers."

And in Adams *vs.* Leavans, 20 Conn. R. above, the Court expressly applied this principle in the case of a set-off acquired by the debtor, after assignment of the debt against him, but before he had notice of it. The Court in this case say: "Douglass took the claims subject to all the equities existing at the time the assignment was made and *perfected*. * * * And had Douglass, immediately upon the assignment, given notice to the defendants of the transfer to him, the defendants would have had no debt to set-off against the claim for rent. But Douglass, for a period of more than two months after the assignment, omitted to give that notice, and, *in the meantime*, the defendants had paid, and taken up from the bank, one of the bills, and, of course, at the time they *received notice*, they were the lawful holders of the bill and, as against the plaintiffs, entitled to a set-off. In order to make the assignment to Douglass *effectual*, and prevent any intervening equities, it was necessary for him to give the defendants notice of the assignment within a reasonable time. Until that was done, the defendants had a right to treat the claim for rent as still due to the plaintiffs. They might well take up the bill for five hundred dollars which they had indorsed to the bank, and hold it to apply on the demand against them for rent, without taking measures to enforce the collection against the plaintiffs. But the other bill stands upon different ground. When the assignment to Douglass was *perfected by the notice*, that remained the property of the bank," etc.

In Mowry *vs.* Crocker, 6 Wisconsin, the same principle is affirmed, and the Court say: "The object of notice was to charge the debtor with the duty of payment to the assignee."

So in 8 Harris., Pa., Gaullagher *vs.* Caldwell, the Court say: "But the equitable assignment of a chose in action *imposes no duty on the debtor* until he has notice of it. The general rule seems to be established (and so it ought to be) that a secret transfer *has no power in it* against the debtor. If he has no notice of any equity residing in a third person, he

may safely deal with him who has the legal right. The rule has been applied even in the case of a legal assignment: 4 Ler. & R., 184. And in an unreported case, we held that a debt in the hands of an assignee was subject to be reduced by *setting off claims purchased* by the debtor against the assignor after assignment and before notice."

In Story Conf. Laws, § 396, it is said: "The notice was indispensable to charge the debtor with the duty of payment to the assignee."

In Rider *vs.* Johnson, 20 Pa. St. R., 192, the Court say: "If a debtor, in the lawful pursuit of his business, parts with his money or property in consideration of the transfer of a cross demand against his creditor, with a view to set-off, it would be unjust to deprive him of this right by a previous assignment, of which he had no notice at the time he parted with the consideration. He has as good a right to purchase a cross demand to extinguish the claim against himself by set-off, as he had to accomplish the same object by direct payment. In the latter case it is not pretended that he could be compelled to pay the debt a second time. The principle is precisely the same in each case. In both cases a valuable consideration is parted with in good faith; and the distinction is immaterial that in one it is done by direct payment, and in the other by the acquisition of a cross demand, which secures the debtor the right of doing it by set-off. In neither case would it be just to drive the debtor to the trouble and expense of recovering his cross demand by action, or to expose him to the peril of losing it entirely by insolvency. * * * It is upon this principle that a vendee who neglects to register his conveyance, is postponed in favor of the assignee without notice, of a mortgagee with notice, although *no statute required* the registry for the protection of such party. Mott *vs.* Clark, 9 Barr 399.

"So the assignee of a judgement, who neglects to docket his assignment, is postponed in favor of a subsequent assignee of the same judgement. Fisher *vs.* Knox, before referred to. On the same principle, the defendant in an action to recover

the price of goods sold in the name of the factor, has a right to set off any cross demand against the factor, acquired before notice of the principals right of property in the goods; 7 T. R. 360 N. A. At an early period it was declared by the supreme court of this State, that the assignee of a choosen action, "stands in the shoes of the assignor, so as to let in every defalcation which the obligor had against the obligee, *at the time of the assignment, or notice of the assignment*"; Wheeler *vs.* Hughes, 1 Dallas, 23. In a more recent case when cross-demands were purchased after the assignment, but *before notice of it*, and an attempt was made to exclude the set-off, upon the ground that the action was brought upon a contract to pay "without defalcation;" it was decided that the assignee of even such a contract, could not deprive the debtor of his right to set-off demands, acquired before notice of the assignment. It was, in that case, declared to be "the duty of the assignor, to inquire of the debtor, whether he had any defense, and to give him notice of the assignment;" *Louden vs. Tiffany* 5 *W & Sen* 370. "This doctrine was not denied or doubted, by either court or counsel, and the cause was reversed, because it was not applied by the court below, to the case of a contract to pay "without defalcation." This must be taken to be a direct adjudication in favor of the principal, because if an assignment without notice, excluded the set-off, the cause was correctly decided below, and the judgement ought not to have been reversed. *Northampton vs. Bank, vs.* Balliet, 8 W. & Ser., 318; the same principle was distinctly affirmed, and it was there decided that if the defendant held the "notes of the bank at *the time he received notice of the assignment*, the assignee would be bound to receive them as cash."

"It is a mistake to suppose that the case last cited was determined upon the principle that the uncurrent and worthless notes of a broken bank are to be treated as money. It is true, they were considered as money, so far as regarded the bank itself: but when the court came to consider the rights of the assignee of the bank, it was distinctly determined that "as between the assignee and the defendants, the notes ceased to

be money, and must be viewed in the ordinary light of a set off merely; and in thus considering the case it was expressly declared, that the important period to determine the rights of the assignee, and the defendants is not the time of the assignment, *but the time defendants had notice of it*, and that "this principle applies as well in the case of set-off as payment." "In Phillips *vs* the Lewistown bank, 6 Harris, 394; the doctrine of the Northampton bank *vs.* Ballet, was recognized by the court, and not doubted by anyone. On the contrary, the question was raised whether notice of the rights of the assignee must be given *in writing*, and it was held that this was not necessary, and that "it was immaterial in what manner the knowledge of the transfer was acquired, so that it existed at the time of the purchase of the notes offered to be set-off."

It will be observed that in the above cases the necessity of notice of the assignment in order to effect the debtor as to demands acquired by him against his creditor after the assignment, is discussed solely upon principle, without reference to any statute requiring such notice. It is true that in some of the states the statute expressly declares that a debtor may set off any demand against his creditor acquired before notice of the assignment; while in other states, as in Massachusetts (Stat. 1860, 670), it is implied from the negative provision of the statute, that "if the demand on which the action is brought has been assigned, and the defendant had notice of the assignment, he shall not set off any demand acquired by him against the original creditor after such notice." These statutes, whether in the positive or negative form, are merely declaratory. The Kansas statutes of set-off are taken from the Ohio statutes; and there is nothing in either respecting the effect of notice, or want of notice, of the assignment of a chose in action. And yet the Supreme Court of Ohio have expressly recognized the general principle, that a debtor should not be deprived of his right to set off a demand acquired against the original creditor after the assignment but before he had notice of it. In Follett vs. Buyer, 4th Ohio State, 586, Thurman, C. J., delivering the opinion of the court,

says: "Where an over due or non-negotiable note is assigned, the assignee takes it subject to all the equities existing between the payee and the maker; and hence it is competent for the latter, notwithstanding the assignment, to show that it was obtained by fraud or without consideration, or that *before he received notice* of the assignment, it had been paid or otherwise discharged. So, too, he may set-off any liquidated demand which he had against the payee, *when he first obtained information* of the assignment, but not claims subsequently acquired, even though they had their origin in previous transactions." In Brashear v. West *et al.*, 7 Pet., referring to the assignment of a chose in action, the Court say (p. 616): "If subsequent to its being made, and before notice of it, any counter claims be acquired by the debtor, these may unquestionably be sustained." See also 17 How., 612, Judson v. Corcoran. Also Waterman on Set-off, p. 126, and authorities there cited.

An examination of the authorities cited by counsel for defendants in error on the question of set-off, will show that they do not sustain the position in support of which they are cited. The cases thus cited are Ross & Ricker vs. Johnson, 1 Handy Bank vs. Hemingray, 31st Ohio State, 168; Myers vs. Davis, 22 N. Y., 489; Fusting vs. Sullivan, 9 Reporter, 85; and Fuller *vs.* Steiglitz, 27 Ohio State, 355.

The case of Ross & Ricker vs. Johnson was upon a negotiable note assigned before due. The sole question was (in the language of the court), "whether the defendant could claim such a set-off against the present plaintiffs, endorsees of the negotiable note before maturity, though they might have had notice of the existence of the claim when they obtained the note." The court held that such set-off could not be allowed, 1st, because "The note having been transferred before it was due, no cause of action had accrued thereon to Newman *before* he assigned the note to plaintiffs. There never was, therefore, cross-demands between Johnson and Newman within the meaning of the statute, and there was nothing to prevent an endorsement of the note by Newman, before it became due, unaffected by any independent claim held by Johnson, though

the party taking the note had knowledge thereof;" and, 2d, because the assignees of negotiable notes were protected by section 25 of the statute, which was as follows: "In case of assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed; but this section shall not apply to *negotiable* bonds, promissory notes, or bills of exchange transferred in good faith and upon good consideration, *before due*." This was the whole of that case.

The case of Bank *vs.* Hemingray, 31, Ohio State, was also upon notes payable to order, and assigned before due, and the case turned upon the question, whether these notes were negotiable under the laws of Kentucky, where made. A majority of the court held that they were negotiable, and transferred before due, and that *therefore*, the set-off could not be allowed. McLlvaine, J., in a dissenting opinion, held that these notes were not negotiable, and then adds: "And if the notes are not negotiable, they were subject *under our laws*, to the defense of set off as to all claims the maker, acquired before notice of the assignment, and pleaded by way of such defence."

In Myers *vs.* Davis, 22 N. Y., cited by defendant, Judge Denio delivering the opinion, expressly recognizes the general principle we are contending for. He says "an assignee of a choosen action who *has given notice* of the assignment, is not liable to be predjudiced by any new dealings between the original parties to the contract; but takes the contract assigned subject to all the rights, which the debtor had acquired prior to the assignment, or to the time *notice was given of it*; where there is an interval between the execution of the transfer, and notice of it." In Fusting *vs.* Sullivan, 9 Reporter, 85, (as in all these cases cited by defendant in error,) the question of notice, or want of notice of the assignment, did not arise. Besides, the court held in this case, that the set-off could not be allowed the complainants, because the judgment "was recovered against them in their character of executors, whereas the promissory notes are held, and could only be lawfully acquired by them in their individual character, and in their

own right. As executors it was not competent for them to apply the assets of the testator, in purchasing outstanding claims against the creditors of the estate;" and because further, the court say: "It appears that the transfer of the promissory notes was not made absolutely, and in good faith, but merely for the benefit of Cross, the assignor, to enable him to collect a debt, which he claims to be due him from Sullivan, by placing the notes in the hands of the complainants *conditionally*, to be used by them as a set-off against the judgment."

In Fuller *vs.* Steiglitz 27, Ohio State, 355; the question of notice of the assignment was not involved. The assignment was a general one for the benefit of creditors, and transferred to the assignee, an account against the defendant for goods sold Nov. 3rd, 1866, on six months time. The asssignment was dated Dec. 11th, 1866, at which time defendant held a note which he had purchased, against the assignor, which did not mature, until Dec. 19th, 1866; and the court held, that as neither the account nor the note was due at the time of the assignment, no cross demands then existed, within the meaning of the statute, which could be set off, one against the other.

If Tate had purchased for a valuable consideration, either he or Slavens must loose, and this, too, solely in consequence of Tate's negligence. Had he notified Slavens in a reasonable time of the assignment, as it was his clear duty to do, Slavens would not have purchased his set-off, and neither would have suffered loss.

It is a maxim both at law and equity, that where one of two must suffer a loss, it should fall on him whose negligence caused it.

a But Tate *parted with no value whatever* in consideration of the assignment to him. According to his own testimony, Myers & Green were insolvent. (*See printed record, pages* 20 *and* 21). They owed him $11,000,—an antecedent debt against an insolvent firm,—a part of which he released to Myers & Green in consideration of their assignment to him of the claim sued on. He is not a *bona fide* assignee for value, and it

is simply absurd to claim that he has rights superior to Slavens, who acquired his set-off against this insolvent firm, before he had notice of the assignment.

L. C. SLAVENS,
NELSON COBB,
Attorneys for Plaintiff in Error.

FILED
SEP 28 1880
JAMES H. McKENNEY, CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES.

MOSES B. GEORGE, AND OTHERS,
Plaintiffs in Error,
vs.
SAMUEL W. TATE, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

STATEMENT OF CASE, BY DEFENDANT IN ERROR.

A. H. CASE,
JOHN K. CRAVENS,
Counsel for Defendants in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

MOSES B. GEORGE, AND OTHERS, *Plaintiffs in Error,*
vs.
SAMUEL W. TATE, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

STATEMENT OF CASE, BY DEFENDANT IN ERROR.

This action was commenced in the State Court, and was by the plaintiffs in error removed into the federal court, where it was tried upon amended petition, and issues made thereon.

This action is upon a bond, in words and figures as follow: "KNOW ALL MEN by these presents, that we, M. B. George, William L. George, James B. George, and John E. George, co-partners, doing business under the firm name

IN THE SUPREME COURT

OF THE

UNITED STATES.

MOSES B. GEORGE, AND OTHERS,
Plaintiffs in Error,
vs.
SAMUEL W. TATE, *Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

STATEMENT OF CASE, BY DEFENDANT IN ERROR.

This action was commenced in the State Court, and was by the plaintiffs in error removed into the federal court, where it was tried upon amended petition, and issues made thereon.

This action is upon a bond, in words and figures as follow: "KNOW ALL MEN by these presents, that we, M. B. George, William L. George, James B. George, and John E. George, co-partners, doing business under the firm name

and style of M. B. George & Brothers, as principals, and J. W. L. Slavens, of Kansas City, Missouri, as surety, are held and firmly bound unto John J. Myers and William Green, in the full sum of ten thousand dollars, to the true payment whereof we hereby bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents, signed, sealed and dated, this 19th day of September, A. D. 1872. THE CONDITION of the foregoing bond is this: That whereas the said Myers and Green have heretofore commenced and now have pending, a civil action in the District Court of Ellsworth county, State of Kansas, against said M. B. George & Brothers to recover the sum of $8509.50 and have also filed their affidavit according to law, for a writ or writs of attachment to issue for the property of said M. B. George & Brothers; and whereas, writs of attachment have issued and are now in the hands of the sheriffs of those counties to which said writs of attachment have been directed; and whereas, the said M. B. George & Brothers have property within the jurisdiction of said court, about to be attached under and by virtue of said writs of attachment; and whereas, said Myers & Green have agreed and promised the said M. B. George & Bros. that they, Myers & Green will recall the said writs of attachment upon their, M. B. George & Bros., executing a bond with approved security to pay the amount of the judgment, and costs, which may be rendered in the said action against said M. B. George & Bros.

Now, therefore, if we, the foregoing named bounden parties, shall well and truly pay to Myers & Green the amount of the judgment and costs which may be rendered in the foregoing named action, by said District Court in

sixty days from the rendition thereof, then the foregoing bond to be void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals, this the 19th day of September, A. D. 1872.

(Signed.) M. B. GEORGE & BROS. Seal.

J W. L. SLAVENS. Seal.

(P. R: 6-7.)

The amended petition alleged that immediately upon the delivery of said bond, Myers and Green approved the security and fully performed all the conditions therein, on their part to be performed; that on or about the 19th day of October, 1872, the said Myers & Green were indebted to the plaintiff in a sum exceeding $12,000, then due, and that Myers & Green at that time, and in consideration of their said indebtedness, sold, assigned and transferred to plaintiff their claim and demand then in suit against said M. B. George & Bros, (P. R. 5.); that on the 14th day of May, 1874, said cause came on for trial in the District Court for Ellsworth county, Kansas, and the judgement was therein rendered in favor of Myers & Green, and against M. B. George & Brothers for $9,758; that on the 18th day of May, 1874, the said Myers & Green assigned to this plaintiff in writing, said judgment and bond, and instruments connected therewith, and all their right, title and interest thereto and therein. (P. R. 5).

The defendants, M. B. George & Bros., answered, jointly, admitting the execution and delivery of the bond sued on, and pleading specially that they were induced to sign

said bond solely by the false and fraudulent representations of Green, and his attorney, that certain cattle of the defendants had been seized and attached by virtue of writs of attachment issued in said suit, and were then held by virtue of such attachments; deny specially, that Myers & Green were indebted to plaintiff in the sum of $12,000, or in any sum about the 19th day of September, 1872, or at any time, that Myers & Green, in consideration of any such indebtedness or for any purpose ever assigned to plaintiff, their claim then in suit against said M. B. George & Bros., or that said Myers & Green ever assigned to plaintiff the judgment against M. B. George & Bros., mentioned, or the bond sued on. (P. R 7).

The defendant Slavens answered separately, admitting the execution and delivery of the bond sued on, denying generally the other allegations of petition, then pleads specially the same facts as are pleaded by other defendants, as to false representations made to him; the answer then sets up a claim against Myers & Green, acquired by defendant Slavens from the firm of Ferguson, Slavens & Co., on the last of July, 1874, which he alleges was before he had any notice whatever of the alleged assignment or any assignment of said judgment or said bond, by Myers & Green to this plaintiff, and asks that so much of this claim as may be necessary to extinguish the same, may be set off against the demand of plaintiff. (P. R. 10-13.)

The plaintiff by replies to these answers traverses all affirmative matters set up in each of them.

POINTS AND AUTHORITIES.

The first assignment of error made by plaintiffs in error

is that "the trial court erred in permitting the defendants in error to read in evidence at the trial, the written assignment, dated November 1st, 1872, signed 'Myers & Green, by Wm. Green.'"

The pleadings made the issue whether Myers & Green had in 1872 assigned to the defendant in error the claim and demand they then had in suit in Ellsworth county, Kansas, against M. B. George & Brothers. Whatever tended to establish that fact was relevant and material testimony. It was not esential that each piece of evidence should be sufficient to establish the fact. It was wholly immaterial how Tate became the assignee of the claim against George & Brothers, whether by the assignment of the respective interests of the partners, Myers & Green, or by the assignment of the firm. The testimony when offered tended to prove the fact of assignment, the sufficiency of the testimony, was a question to be later considered. In *Insurance Company v. Lawrence*, 2 Peters 44, this court said, "It is undoubtedly true, that questions respecting the admissibility of evidence are entirely distinct from those which respect its sufficiency or effect. They arise in different stages of the trial, and cannot with strict propriety be propounded at the same time." And in *Hepburn v. Dubois*, 12 Peters 376, "where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact." Whether the court subsequently erred in construing the assignment or in its judgment as to the effect to be given to it, cannot affect the question of admissibility. The first assignment of error is not well laid.

"The defendants (plaintiff in error) on the trial offered

to prove that they were induced to execute the bond sued on by the representations of said Myers & Green and their agents and attorneys, made to defendants at the time of the execution of said bond, that the cattle of said M. B. George & Bros. had been attached, and were still held by the sheriff of Ellis county, Kansas, by virtue of a writ of attachment issued in the suit mentioned in said bond. That said representations were false and fraudulent, and made knowing they were false, for the purpose of inducing said defendants to sign said bond, and that said defendants were induced to execute said bond by said false and fraudulent representations. But the court refused to allow said evidence to be given." (P. R. 21). The ruling of the trial court in excluding the evidence so offered by defendants, constitutes the second assignment of error.

When the parties to the bond prepared it and signed it, they deliberately and explicitly recited in it the facts which constituted the consideration upon which it was executed, and as forming part of these they recited, "whereas writs of attachment have issued and are now in the hands of the sheriffs of those counties, to which said writs of attachment have been directed; and whereas said M. B. George & Bros. have property within the jurisdiction of said court about to be attached under and by virtue of said writs of attachment," etc. Thus the parties had agreed together what the consideration was, and reduced that argument to writing. The consideration thus agreed upon and reduced to writing, became as unchangeable and incontrovertable as the covenants contained in the agreement. The answers do not controvert the recitals of the bond, but set up other and varient facts. The facts which defendants sought to

prove were totally at variance from the facts recited in the bond, and tended directly to contradict the recitals of the bond. The defendants were estopped to deny, or contradict the recitals of the bond *Bigelow on Estoppel* 295 et seq. As said by Lord DENMAN in *Bowman v. Taylor* 2 Adolp. & Ellis, 278, (1834,) "The plea puts a fact in issue in direct contradiction of the recitals of the deed. * * * If a party has by his deed recited a specific fact, though introduced by 'whereas,' it seems to me impossible to say that he shall not be bound by his own assertion so made under seal. And by PARKS B. in *Carpenter v. Bulier*, 8 M. & W. Excheq., 209 (1841); "If a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound, to deny the recital, and a recital in instruments not under seal may be such as to be conclusive to the same extent." And by PATTESON J. in *Stonghill v. Buck* 14 Adoph. and Ellis (N. S.) 781 (1850); "When a recital is intended to be a statement which all the parties to the deed have mutualty agreed to admit as true, it is an estoppel upon all." The same doctrine was announced by this court as early as 1830, in *Carver v. Jackson* 4 Petes 1. The second assignment of error is not well laid.

The third assignment of error is, that the court erred in instructing the jury that, "The assignment of November 1st, 1872, by Green to Tate, transferred under the evidence in this action, the bond sued on in this case, with the right of Tate to sue for Green's interest therein." This instruction

standing alone might be subject to criticism, but taken in connection with other instructions and the evidence, it is manifest that it had no influence whatever on the minds of the jurors in making the verdict.

In September, 1872, Myers & Green commenced their action against George & Bros., and on September 19th, 1872, the bond in suit was executed by which the defendants bound themselves to pay to Myers & Green the amouut of the judgment and costs which might be rendered in that action. The bond was clearly designed and intended to secure the claim or demand then in suit, the amount and maturity only remaining undetermined, and these to become fixed by the judgment. At the time the action in favor of Myers & Green against George & Bros. was pending, Myers & Green were indebted to Tate in a sum much larger than they were asserting against George & Bros. The plaintiff, Tate, testified: "Left my home in Llano county, Texas, about the 15th or 16th of October, 1872, went to Austin; there I saw J. J. Myers, of the firm of Myers & Green. They owed me $11,000, which I wanted to collect. Myers said they were hard up, but that they had a claim against George & Bros. then in suit in Kansas. He said to me, 'Go up and see Billy Green, and he will let you have the claim against George & Bros.' I came on to Ellsworth, and there I saw Green, and told him what Myers had said to me. Green got Mr. Wills to write the assignment dated November 1st, 1872, and it was delivered to me that day, at Ellsworth, by Mr. Green. It was then agreed by Mr. Green that the judgment should be assigned to me as soon as rendered. I took the assignment home with me, and afterwards saw Myers in Llano

county, Texas. I showed Myers the assignment made by Green; he read it, and said it was all right. I then gave up to Myers the notes of Myers & Green to the amount of the claim against George & Bros. Myers said the bond secured the claim, and that I would be sure of my money." (P. R. 20-21.) The testimony of Tate, and the assignment itself, was all the evidence touching the execution of this assignment. The testimony was uncontradicted, and conclusively established its legal effect. Tate, under direction of Myers, one of the partners, went from Texas to Kansas to get the claim which Myers & Green had against George & Bros.; when he reached Green he informed Green that Myers had told him that he would let him have the claim; Green then got another party to write the assignment dated Nov. 1st, 1872, and though it speaks of the interest of Green, it is signed by the firm name. There can be no doubt that by that assignment Tate supposed he was getting, and Green intended to transfer the entire interest of the firm. Tate then took the assignment with him to Texas, where he showed it to Myers, who read it and approved it. Then Tate gave up to Myers the notes of Myers & Green to the amount of the claim against George & Bros. Here was authority expressly given before the fact, ratification after the fact, with receipt of full benefit from the fact. May 14th, 1874, judgment was rendered in favor of Myers & Green against George & Bros., and on May 18th, 1874, exactly in conformity with the agreement made by Green on November 1st, 1872, Myers & Green assigned the judgment to Tate, and in that assignment they say, "Whereas said Myers & Green since the commencement of the above suit, and before said judgment, sold their demand against

the defendants to Samuel W. Tate, for a debt owed by Myers & Green to Tate, and said suit has been carried on in the name of Myers & Green, to judgment, and the said judgment and the bonds and instruments connected therewith and taken in said suit by the plaintiffs from the defendants and their sureties belong to said Tate;" (P. R. 18,) thus clearly showing the understanding which the parties had, and how they acted upon it. The court should have instructed the jury that the assignment of November 1st, 1872, taken in connection with the uncontroverted evidence adduced, conclusively established that by that instrument Myers & Green transferred to Tate the claim they then had in suit against George & Bros., as therein described, and all securities they held for the payment of the same. *Howe v. Sheppard* 2 Sumner 409; *Chandler v. Von Roeder* 24 Howard 224; *Turner v. Yates* 16 Howard 14; *Drakely v. Gregg* 8 Wallace 242; *Orleans v. Platt* 99 U. S. 676. Whatever evil tendency the charge had, was favorable to the defendants and against the plaintiff; and that it did not mislead the jury is manifest from the verdict. *Stadden v. Hazzard* 34 Mich, 76; *State v. Raymond* 11 Nev. 98; *Transportation Line v. Hope* 95 U. S. 297; *Walker v. Johnson* 96 U. S. 424. The extent of the instruction was as to the right of the plaintiff to sue; he had sued for the whole amount of the bond and not for Green's interest; this he clearly had a right to do upon both assignments.

The remaining assignments of error relate to the question of set-off, raised by the given and refused instructions, and will be discussed as a whole. Set-off was unknown to the common law, and equitable relief, where any exists, is unknown in actions at law in the Federal Courts. Section

914 of R. S. U. S. requires that the practice, pleadings and forms and modes of proceedings in civil causes at law, in the Circuit Courts shall conform as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time, in like causes in the courts of record of the States within which the Circuit Court is held. Whatever right of set-off the defendant Slavens had, depends upon the law existing in the State of Kansas. The provisions of the statute law of that State relating to this subject are as follows: Sec. 94, page 648, (Gen. Stats. 1868): "The answer shall contain; * * * *Second*, A statement of any new matter constituting a defense, counter-claim or set-off; * * * *Third*, * * * The defendant may set forth in his answer, as many grounds of defense, counter-claim, set-off * * as he may have," etc. Section 96, page 649, "If the defendant omit to set up a counter-claim or set-off, he can not recover costs against the plaintiff in any subsequent action thereon," etc. Section 99, page 649, "When it appears that a new party is necessary to a final decision upon the set off, the court shall permit the new party to be made; if it also appear that, owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim, unless permitted to use it as a set off." These sections all recognize the well settled rule that a set-off is and must be a right of action existing in favor of the defendant and against the plaintiff, at the time action is brought. A set-off can not exist unless at time of action brought the defendant had a right of action against plaintiff; a right of action against some third party will not suffice. In *Howe v.*

Sheppard 2 Sumner 409, Mr. Justice *Story* formulated the rule, "Where there are mutual debts, which may be set-off in law or in equity, I take it to be clear, that the right of set-off is extinguished by a *bona fide* assignment of one of the debts." To remedy the evil resulting from this rule the Statute of Kansas enacts, Section 100, page 649, "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counter-claim or set-off, could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other; but the two demands must be deemed compensated, so far as they equal each other." The provisions of the Kansas Statute are taken from the Ohio code. The most explicit exposition of this Statute we have found is in *Ross & Ricker v. Johnson*, 1 Handy 389. Action on note made by defendant to one Newman, and by Newman endorsed to plaintiffs. Defense, by way of cross-demand or set-off, that after the execution of the note Newman had received certain money which he was bound to pay over to defendant. GHOLSON J. said: "The right of set-off depends upon the provisions of the Statute. The Statutes on the subject of set-off were repealed by the code, and we are now to look into its provisions for the rules by which it is governed. Upon looking into those provisions, I do not think any new rule as to the right of set-off was introduced. * * * A set-off must be a cause of action, and properly it must be a cause of action against the adverse party; in other words, to constitute a set-off there must be mutual demands. But when there are such mutual demands, one party should not be allowed to defeat the right of set-off by a transfer

or assignment of his demand. This matter is accordingly regulated by section 99 of the code, which provides; 'Where cross-demands have existed between persons under such circumstances that if one had brought an action against the other, a counter claim or set off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other; but the two demands must be deemed compensated so far as they equal each other.'

"In the sense in which the term 'cross-demands' is used in that section, they must have existed before the assignment, and have been such that at the time of the assignment each party could have brought an action on his demand against the other." See also *Fuller v. Steiglitz* 27 Ohio State 355; *Bank v. Hemingray* 31 Ohio State 168; *Myers v. Davis* 22 N. Y. 489. In the recently decided case of *Fusting v Sullivan* 9 Reporter 85, it is held by the Supreme Court of Maryland: "We think there are several insuperable objections to the set-off claimed by the complainants: 1st. It appears from the evidence that the judgment was assigned to McDougall in good faith, and for a valuable consideration, before the promissory note came into the possession of the complainants. At the time the assignment was made there existed no equitable right of set-off, or any cross-claim whatever by the defendants in the judgment; the promissory notes were then held by Cross, who was a stranger to the judgment. Under these circumstances the transfer of the notes to the complainants could not affect the rights of McDougall, the assignee who purchased in good faith and without notice." This decision is manifestly based upon a statute identical in effect

with section 100 of the Kansas code, and the case is in its facts very similar to the one at bar. Conceding for the purpose of applying the conclusion to which we have come that the plaintiff got nothing by the assignment of November 1st, 1872, there can be no question that under the assignment made May 18th, 1874, he acquired all the rights and interests of Myers & Green in the "judgment and all bonds and instruments taken therein and connected therewith during the progress of said suit." From that date Myers & Green certainly ceased to be parties in interest in the judgment or bond, or the proceeds arising therefrom. That Tate purchased in good faith is established by the fact that he had in November, 1872, surrendered to Myers & Green their indebtedness to him *pro tanto* the claim against George & Bros. Under the Statute the cross-demands must be mutual or they are not protected against assignments; they must so exist that either party might sue the other as upon a present matured cause of action, in his own right. Prior to the assignment made in July, 1874, the defendant Slavens had no right of action against Myers & Green; he did not even hold a demand against them. Had Myers & Green not assigned their claim against Slavens to plaintiff, and had they sued him upon it prior to the date at which he obtained the claim from Ferguson, Slavens & Co., he could not, under any known rule of law or equity, have used the debt due to his firm as set-off to extinguish his own personal, individual liability. Prior to the date at which Slavens acquired his demand against Myers & Green they had transferred to the plaintiff, so that cross-demands did not exist between them; there never was a moment when the claim

sued upon and that which is sought to be set up as a defense, stood in opposition so that they could be set-off or discharged *pro tanto* by compensation. In the parallel case of *Howe v. Sheppard*, 2 Sumner 409, Mr. Justice STORY said, "It seems to me very clear that the right of set-off * * * was gone, or rather never had any real existence."

It will doubtless be contended by plaintiffs in error that defendant Slavens should be allowed his set-off on the ground that he purchased it without notice that Myers & Green had assigned to plaintiff, and that the trial court erred in giving and refusing instructions relating to that subject. The short answer to that position is, that the Statute of Kansas does not predicate the right of set-off upon notice or want of notice, but upon existent facts at date of transfer. The plaintiff took the assignment from Myers & Green in good faith, for full consideration and without notice, for in fact Myers & Green did not then owe Slavens anything. Why should plaintiff be called upon to pay, by way of set-off, the debt of his assignors? But the defendant Slavens cannot claim to stand in the position of *bona fide* purchaser without notice. He was present at the trial of the action of Myers & Green *vs.* George & Bros., on the 14th of May, 1874, when Green was upon the witness stand, and heard; or if he had been paying attention, might have heard; and as he was surety on bond to pay whatever judgment might be recovered in that action, he no doubt paid particular attention to what Green said. The testimoy of Green is detailed by witnesses on page 19 P. R. That testimony was sufficient to inform Slavens that some change had taken place in the ownership of the

claim against George & Brothers, and that Tate, the plaintiff in this action, had acquired some interest in it, or right to it. Six weeks after the trial and six weeks after the second assignment, the defendant Slavens procured the demand against Myers & Green, which he claims to set-off. He was charged with notice from the date of trial that Tate had become the owner of the whole, or some part of the claim against George & Bros.; that notice attached at the time he acquired the claim against Myers & Green, and he was at that time bound to make inquiry; it was his duty *then* to learn all that he could learn from sources of information that were open to him, and of which he was advised; and the law charges him with knowledge of all the facts which he might have learned had he made inquiry at that time. It is said in notes to *Le Neve v. Le Neve* 2d Leading Cases in Equity 153, "A purchaser is chargeable with notice not only where the evidence raises a presumption that he knew, but where there is just ground for inferring that reasonable diligence would have led him to a discovery of the truth. One who willfully remains ignorant, where the rights of third persons are concerned, is as much in default, as if he had the knowledge which he avoids. The question therefore, is not merely did the defendant know, but had he sufficient information to render it his duty to inquire, and would an investigation, in the ordinary course of business, have led to a discovery? or, as the rule is sometimes stated, a purchaser has notice, not only of what is definitely communicated to him, but of all that a proper use of that information, would have enabled him to ascertain." Whatever is sufficient to excite inquiry is notice; where inquiry is suggested it is duty to inquire;

that which might have been learned had inquiry been made, is known. In the language of Mr. Justice STRONG in *Cordova v. Hood* 17 Wallace 1, "Wherever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty." There was no error committed by the trial court prejudicial to the plaintiffs in error, and the judgment should be affirmed.

A. H. CASE,
JOHN K. CRAVENS,
Counsel for Defendants in Error.